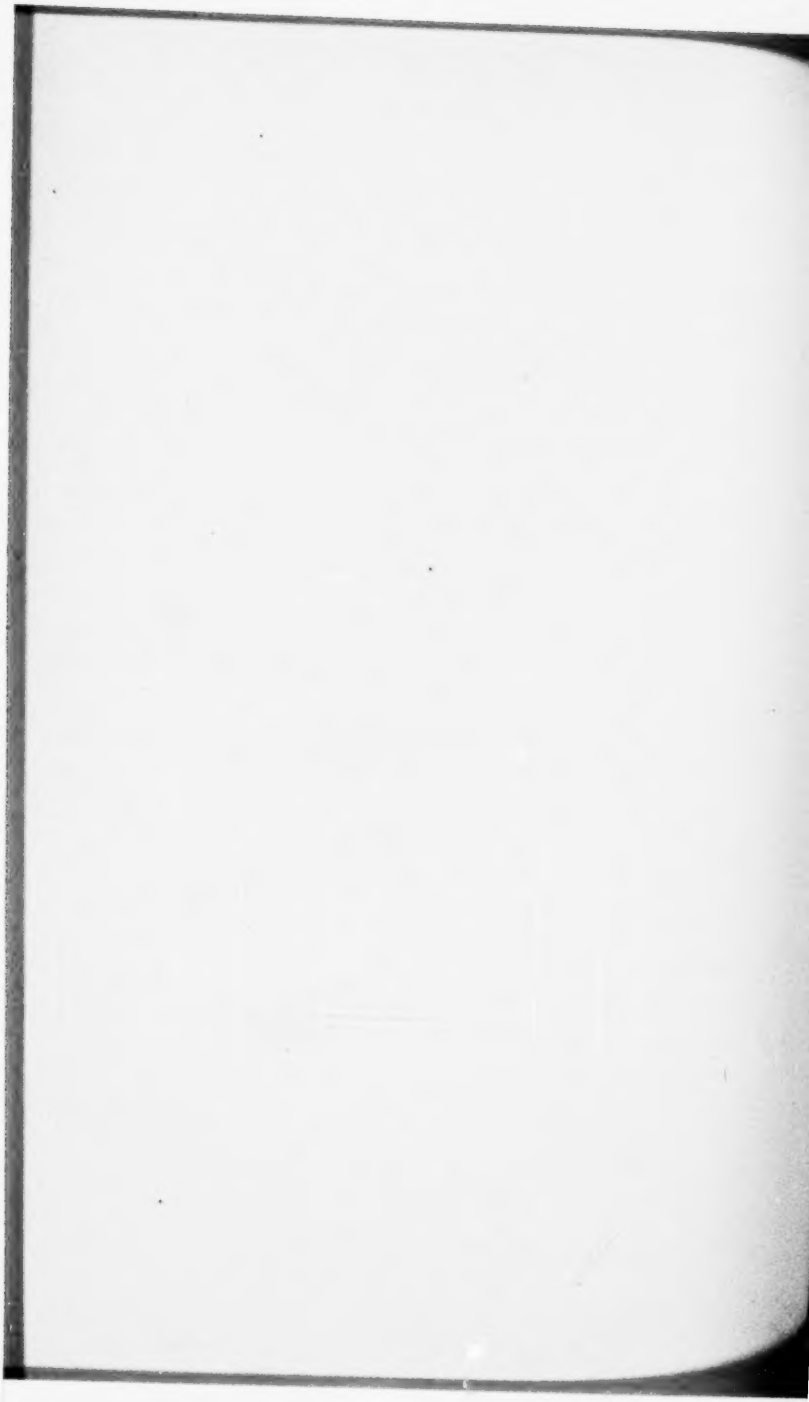


TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 243.

BARBARA CHAVEZ DE ARMIJO, APPELLANT,

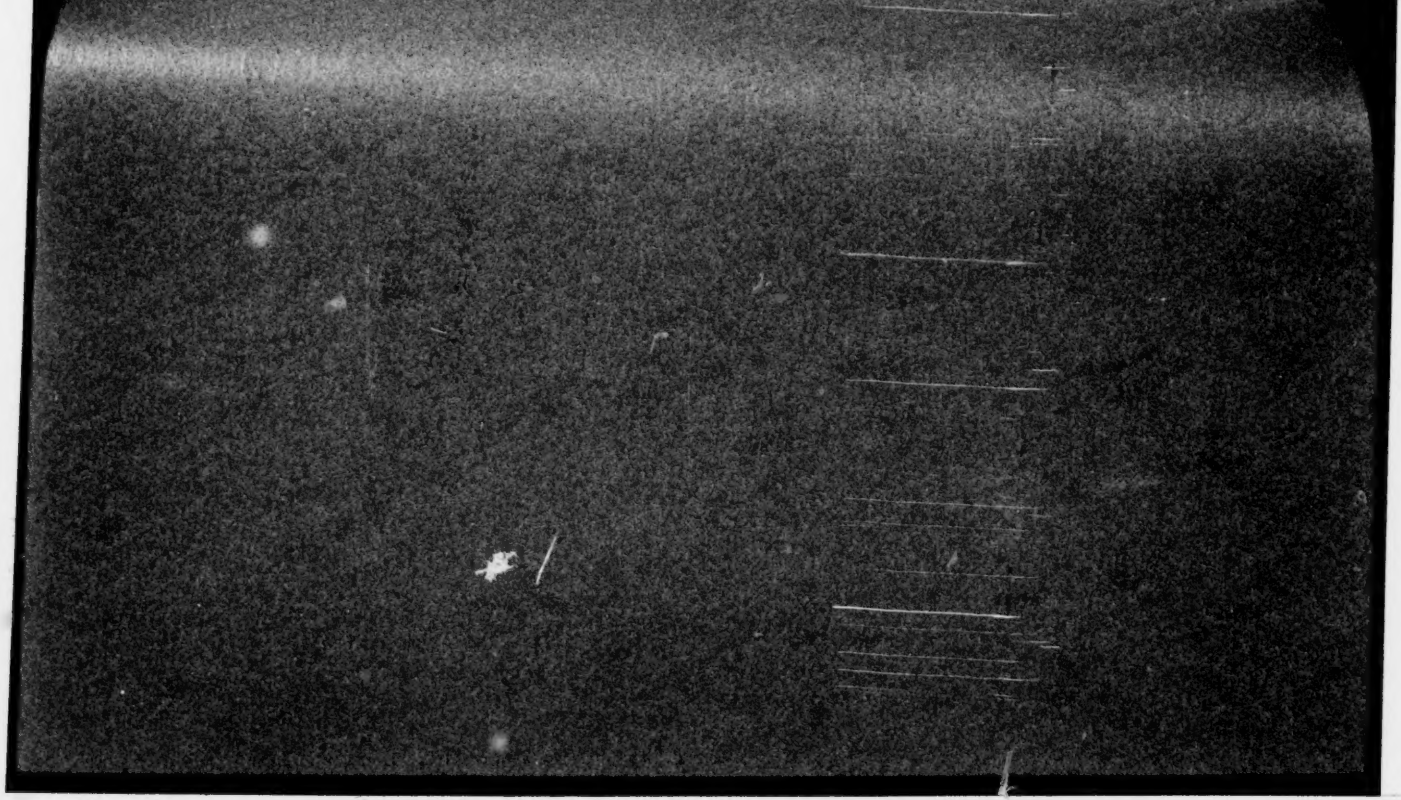
vs.

JUSTO R. ARMIJO.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED APRIL 8, 1901.

(17,205.)



(17,706.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 243.

BARBARA CHAVEZ DE ARMIJO, APPELLANT,

vs.

JUSTO R. ARMIJO.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 Be it remembered that heretofore, on the fourteenth day of December, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of record; which said transcript of record is in words and figures as follows, to wit:

2 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1900.

BARBARA CHAVEZ DE ARMIJO, Plaintiff in Error,
vs.
JUSTO R. ARMIJO, Defendant in Error. } No. 840.

Error to district court, Bernalillo county.

Filed in my office this Nov. 21, 1899.

JOSE D. SENA, *Clerk.*

Warren & Fergusson, Warren & Chavez, attorneys for plaintiff in error.

Filed in my office this Dec. 14, 1899.

JOSÉ D. SENA, *Clerk.*

3 Be it remembered that heretofore, to wit, on the 13th day of February, 1897, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, plaintiff's declaration, which said declaration is in words and figures following, to wit:

TERRITORY OF NEW MEXICO,
Bernalillo County.

In the District Court, Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo, in said District, for the Trial of Causes Arising under the Laws of said Territory, at the March Term, A. D. 1897.

To the Honorable Needham C. Collier, associate justice of the supreme court in the Territory of New Mexico and judge of the second judicial district court thereof:

Your petitioner, Justo R. Armijo, a resident of the county of Bernalillo and Territory of New Mexico, complains of Barbara Chavez de Armijo, who is likewise a resident of the same county and Territory, in an action of assumpsit, for that whereas, heretofore, to wit, on the first day of January in the year of our Lord one thousand eight hundred and ninety-seven, at to wit, the county of Bernalillo, aforesaid, the said defendant was justly indebted to the plaintiff in the sum of $9,434.44 for the work and labor, care and diligence of the said plaintiff by the said plaintiff, before that time done, performed and

bestowed in and about the business of said defendant, and for
4 the said defendant, and at her special instance and request, and in the further sum of $9,434.44 for interest accrued upon divers sums of money before that time due and owing from the said defendant to the said plaintiff, and by the said plaintiff to the said defendant forborne for long spaces of time, at the special instance and request of the said defendant; and in the further sum of $9,434.44 for money by the said plaintiff lent to the said defendant, at her special instance and request, and in the further sum of $9,434.44 for money by the said plaintiff advanced to and paid, laid out and expended for the said defendant, at her like special instance and request, and in the further sum of $9,434.44 for money of the said plaintiff before that time had and received by the said defendant, and being so indebted, she, the said defendant, then and there faithfully promised the said plaintiff to pay him the said several sums of money, when she, the said defendant, should be thereunto afterwards requested.

And for that whereas, the said defendant heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and ninety-seven, the said defendant accounted with the said plaintiff of and concerning divers other sums of money from the said defendant to the said plaintiff then and there due and owing, and then in arrears and unpaid, and upon such accounting the said defendant was then and there found to be in arrear and indebted to the said plaintiff in the further sum of $9,434.44, of like lawful money, and being so found in arrear and indebted, she, the said defendant, undertook, and then and there faithfully promised the said plaintiff to pay him the said sum of money when she should be afterwards thereunto requested.

5 And the said defendant, not regarding her several promises and undertakings hath not as yet paid the said several sums of money, any or either of them or any part thereof, though often requested so to do, but to pay him the same has hitherto neglected and refused and so doth neglect and refuse to the damage of the said plaintiff in the sum of $10,000.

Plaintiff files herewith and makes a part of this declaration, a bill of particulars of his said claims, and makes the same Exhibit "A." Wherefore, plaintiff brings this suit and prays judgment against the said defendant for said sum of $10,000, his damages, together with interest and costs of suit.

NEILL B. FIELD,
Attorney for Plaintiff.

Barbar- Chavez de Armijo to J. R. Armijo, Dr.

1897.		
Jan. 1.	To 5 years' service as manager at $2,500 a year...	$12,500.00
	To balance due me as per manifest in your possession for moneys advanced.....	3,717.65
	To interest on monthly balances of cash.....	290.12
		$16,507.77

Cr.

By my note held by you dated July 11, 1892... $6,000.00
By interest on same 4 yrs. 5 mos. and 20 days at 4 per cent. per annum..... 1,073 $7,073.33

Balance $9,434.44

(Endorsed: Filed in my office this Feb. 13, 1897. O. N. Marron, clerk.)

6 And thereafter, on, to wit, the 4th day of March, 1897, there *was* filed in the office of the clerk of said court, in said cause, defendant's pleas, which said pleas are in words and figures, following, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the Second Judicial District Court.

JUSTO R. ARMIJO }
vs. } No. 4728.
BARBARA CHAVEZ DE ARMIJO. }

Now comes the defendant, Barbara Chavez de Armijo, by Warren, Fergusson and Gillett, her attorneys, and defends the wrong and injury, when, etc., and says that she did not promise or undertake in manner and form as the said plaintiff hath above thereof complained against her, and of this she puts herself upon the country.

WARREN, FERGUSSON & GILLETT,
Attorneys for Defendant.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the Second Judicial District Court.

JUSTO R. ARMIJO }
vs. } No. 4728.
BARBARA CHAVEZ DE ARMIJO. }

And for a further plea in this behalf the said defendant says, that the said plaintiff ought not to have or maintain his aforesaid action against her, the said defendant, because she says that the said plaintiff, before and at the time of the commencement of this suit, to wit, at the county of Bernalillo, aforesaid, was and still is indebted to the said defendant in a large sum of money, to wit, the sum of fourteen thousand ($14,000) dollars for work and labor, care and diligence of the said defendant, by the said defendant before that time done, performed and bestowed in and about the business of the said plaintiff, and for the said plaintiff and at his request,

7 and for divers materials and other necessary things by the said defendant before that time found and provided, and used and applied in and about the said work and labor for the said plaintiff, and at his like request; and for divers goods, wares and merchandise sold and delivered by the said defendant to the *the* said plaintiff at his like request; and for money by the said defendant before that time lent and advanced to, paid, laid out and expended for the said plaintiff and at his like request; and for money by the said plaintiff before that time had and received to and for the use of the said defendant, and for money due and owing from the said plaintiff for interest upon and for the forbearances of divers sums of money due and owing from the said plaintiff to the said defendant, and by the said defendant foreborne to the said plaintiff for divers long spaces of time before then elapsed; and for money due and owing from the said plaintiff to the said defendant upon an account stated between them. Which said sums of money so due and owing to the said defendant as aforesaid, exceeds the damages sustained by the said plaintiff by reason of non-performance by the said defendant of the said several supposed promises and undertakings in said declaration mentioned, and out of which said sums of money so due and owing from the said plaintiff to the said defendant, the said defendant is ready and willing and hereby offers to set off and allow to the said plaintiff the full amount of damages according to the form of statute in such case made and provided. And this the defendant is ready to verify. Wherefore, she prays judgment whether the said plaintiff ought to have or maintain his aforesaid action against her, the said defendant.

WARREN, FERGUSSON & GILLETT,
Attorneys for Defendant.

8 (Endorsed: Filed in my office this Mar. 4, 1897. O. N. Marron, clerk.)

And thereafter, on to wit, the 5th day of March, 1897, there *was* filed in the office of the clerk of said court, in said cause, plaintiff's replications, which said replications are in words and figures following, to wit:

TERRITORY OF NEW MEXICO:

Bernalillo District Court, March Term, 1897.

JUSTO R. ARMIJO
vs.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

And the said plaintiff as to the plea of the said defendant by her firstly above pleaded and of which she hath put herself upon the country, doth the like.

NEILL B. FIELD,
Attorney for Plaintiff.

And the said plaintiff as to the plea of the said defendant by her secondly above pleaded, says, that he did not undertake or promise in manner and form as the said defendant hath above thereof complained against him, and this the said plaintiff prays may be inquired of by the country.

NEILL B. FIELD,
Attorney for Plaintiff.

(Endorsed: Filed in my office this Mar. 5, 1897. O. N. Marron, clerk.)

And thereafter, on to wit, the 20th day of April, 1898, there was filed in the office of the clerk of said court in said cause, motion for reference, which said motion is in words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In Second Judicial District Court.

9 JUSTO ARMIJO
vs.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

Now comes the defendant herein, by Warren, Fergusson and Gillett, her attorneys, and asks that the court refer this cause to a referee, and for grounds of this motion show- here to the court the following:

First. That it is apparent from the pleadings and motions in this cause that the matters involved in this cause will necessitate the examination of long and voluminous book accounts.

Second. That this is a proper case in which to make a reference to a referee.

Third. That under the code in force in this Territory the defendant is entitled to have this case referred to a referee.

And for many other good and sufficient reasons.

WARREN, FERGUSSON & GILLETT,
Attorneys for Defendant.

(Endorsed: Filed in my office this Apr. 20, 1898. Harry P. Owen, clerk.)

And thereafter at a regular term of the district court of the second judicial district of the Territory of New Mexico begun and held within and for the county of Bernalillo, on the thirty-ninth day of said term, the same being the 20th day of April, A. D. 1898, the following among other proceedings were had and entered of record:

Present: The Honorable Johnathan W. Crumpacker, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof.

JUSTO R. ARMIJO
vs.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

10 This cause is this day heard upon defendant's motion for a reference of this cause to a referee, which motion is resisted by the plaintiff on the ground that plaintiff is thereby denied the right of trial by jury, and the court being duly advised—

It is considered and ordered by the court that said motion for a reference be and it is hereby granted.

And it is further ordered that this cause be and it is hereby referred to Wm. D. Lee, as referee to take the proofs of the plaintiff herein, and that said referee to whom this cause is referred, report his findings of fact and conclusions of law in this cause with all possible speed.

And thereafter, on, to wit, the 18th day of August, 1898, there was filed in the office of the clerk of said court, in said cause, the referee's report, which said report is in words and figures following, to wit:

In the District Court, County of Bernalillo, Territory of New Mexico.

JUSTO R. ARMIJO
vs.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

Referee's Report.

To the Honorable J. W. Crumpacker, associate justice of the supreme court of the Territory of New Mexico and judge of said district court:

As referee in the above-entitled cause, I do respectfully report:

That having heretofore been appointed referee in the above-entitled cause, I caused said parties, together with their respective counsel and witnesses, in pursuance of due notice given in accordance with the statute, to appear before me in my office in the city of Albuquerque, on the 5th day of May, 1898, and on a number of days thereafter, for the purpose of submitting their respective

11 proofs in the above-entitled cause. That a large amount of typewritten testimony was taken before me comprising one hundred and sixty-one pages of such typewritten testimony, and a large number of exhibits were introduced in evidence, and filed with me as referee, all of which testimony and exhibits are returned herewith as a part of my report.

Said case is an action in assumpsit on the common counts wherein the plaintiff demands ten thousand dollars damages.

The defendant pleads non-assumpsit and a set-off for fourteen thousand dollars also on the common counts, against the plaintiff.

The issues being thus formed, it would appear, the controversy would be simply the correct balance between them, but the first question that arose was as to the existence of a contract claimed to

have been entered into between the parties on the 20th day of June, 1892, by which the defendant had employed the plaintiff to work for her at an annual salary of $2,500.00 per year, which alleged contract was claimed to have been in writing, bnt had been lost. The existence of this contract was most emphatically denied by defendant, thus raising an issue of fact, the existence of which extended through many days making a record of many pages of typewriting.

Plaintiff introduced what he claimed to be a copy of the contract, which reads as follows:

"Copy, April 25, 1898."

ALBUQUERQUE, N. MEX., *June* 25, 1892.

This agreement made on the date above written between us is: That from the first day of January, 1892, J. R. Armijo shall be paid for his services at the rate of ($2,500.00) two thousand five
12 hundred dollars per year.

J. R. ARMIJO.
MRS. N. T. ARMIJO.

(The above is a certified translation made by the court stenographer.)

If this contract should be admitted in evidence it would prove but one controverted question in the case, and that is, as to the amount of plaintiff's compensation. The fact that plaintiff performed the services as set forth in the declaration is not denied, nor is the testimony of plaintiff as to the value of his services disputed by any other evidence in the case. Mr. Diekmann was asked as to the value of the services for collecting the rents for the N. T. Armijo building, which he said were five per cent., but does not pretend to say what the services of plaintiff were or the value thereof. The defendant herself does not claim to know, but testifies most positively that she does not know. On page 59 of the record in answer to a question she gives an unequivocal answer as follows:

Q. Mrs. Armijo, do you know what the services of J. R. Armijo were reasonably worth in acting for you as your agent during the period he was so engaged up to December 31st, 1896, for each year?

A. I don't know what the services were worth, they must have been like the services of all managers.

Q. Do you know, Mrs. Armijo, what services were performed by J. R. Armijo for you during these years, before December 31st, 1896?

A. He collected my rents, attended to all my business, taxes and all, collect the rents, pay the taxes every year and pay my accounts every year.

Q. Do you know how much of his time was occupied to do that?

13 A. I do not.

The testimony of defendant shows that the employment of plaintiff was not confined to collecting rents of the Armijo building,

while the testimony of plaintiff is to the effect that the entire charge and management of the whole estate was the services rendered.

There being no testimony offered on the part of the defendant in any way controverting the value plaintiff sets upon his services the admission of the contract becomes immaterial, and it would have no effect on the result of the case. Plaintiff testifies that his services were worth twenty-five hundred dollars per annum, the same amount as which was claimed to be fixed in the alleged agreement, and as there is no testimony controverting this value, the referee will have to take this amount as correct in summing up the case.

There is no dispute as to the period of services rendered by plaintiff for the defendant, being five years, nor is there any question or dispute as to the amount of money claimed by plaintiff to have been advanced by him for the use of defendant, this amount being $3,717.65.

The defendant introduces under her set-off, a note given by plaintiff for the sum of $6,000, made July 11th, 1892, with interest at four per cent. per annum; also a check for $3,824.48, cash that plaintiff received from defendant about the date of his employment, and which defendant testifies and claims was paid plaintiff as an advance for services to be rendered in the future. There is no evidence on the part of plaintiff disputing the first of these items, he admits giving the note and says in his testimony that it was
14 for borrowed money, as to the second item there is not sufficient proof to establish it as a gift from defendant to plaintiff, as claimed by him, referee therefore finds that said plaintiff is properly chargeable with the amount of said item.

A statement of the account between them as shown by the evidence is as follows:

Am't claimed by Mrs. N. T. Armijo to have been paid to J. R. Armijo for future services		$3,824.48
Less salary for J. R. Armijo for year 1892		2,500.00
Jan. 1, 1893. Balance due Mrs. N. T. Armijo on money advanced		$1,324.48
Jan. 1, 1894. Note of J. R. Armijo, to Mrs. Armijo, dated July 11, 1892		6,000.00
Jan. 1, 1894. Interest on above note from July 11, 1892, to January 1, 1894, at 4 per cent., 1 yr., 5 mos. and 20 days		353.33
Jan. 1, 1894. Amount due Mrs. Armijo		$7,677.81
Less salary for J. R. Armijo for 1893		2,500.00
Amount due Mrs. Armijo Jan. 1, 1894		$5,177.81
Jan. 1, 1895. Inte. at 4 per cent., 1 yr		207.11
Jan. 1, 1895. Amount due Mrs. Armijo		$5,384.92
Less salary for J. R. Armijo for 1894		2,500.00
Amount due Mrs. Armijo Jan. 1, 1895		$2,884.92

Jan. 1, 1896. Int. at 4 per cent., 1 yr.....		115.39
Jan. 1, 1896., Amount due Mrs. Armijo.....		$3,000.31
Less salary J. R. Armijo for 1895		2,500.00
Amount due Mrs. Armijo, Jan. 1, 1896		$500.31
15		
Apr. 1, 1896. Three months' interest at 4 per cent.....		5.00
		$505.31
Apr. 1, 1896. Salary J. R. Armijo 3 months.....		625.00
Balance due J. R. Armijo April 1, 1896.....		$119.69
Dec. 31, 1896. Salary J. R. Armijo from April 1, 1896, to December 31st, 1896, 9 months.....		1,875.00
Balance due J. R. Armijo Jan. 1, 1897, on account of salary.....		$1,994.69
Amount advanced by J. R. Armijo for Mrs. Armijo.....		3,717.65
Total amount due J. R. Armijo Jan. 1, 1897.....		$5,712.34
Amount due J. R. Armijo, July 1st, 1897, being six months from the date when Mr. Armijo severed his connection with the business of Mrs. Armijo and being six months from the date of the last item in said account..		$5,712.34
Interest from July 1st, 1897, to August 15th, 1898, 1 yr., 1 mo. and 15 days at 6 per cent.....		385.58
		$6,097.92

In a running account, such as this, where money is advanced by both sides, and one party is in the employment of the other, no interest should be allowed on balances unless expressly agreed to and can only be allowed six months from the date of the last
16 item. In summing up the account, I find that there was due J. R. Armijo a balance of $5,712.34 on January 1st, 1897, and with interest six months from that date up to the present time, or date of this report, at six per cent. being one year, 1 month and 15 days, amounts to $385.58; I therefore find that there is a balance due J. R. Armijo from Barbara Chavez de Armijo, on the 15th day of August, 1898, of $6,097.92; and I respectfully recommend that a judgment be entered in favor of J. R. Armijo for that amount, together with costs.

In compliance with the statutes I certify that testimony or proofs were introduced before me for nine full days, and that I have been occupied six days in examining the books, exhibits and testimony and authorities in this cause, which are very voluminous and in getting up my report as referee.

All of which is respectfully submitted.

WM. D. LEE, *Referee.*

In the District Court, County of Bernalillo, Territory of New Mexico.

JUSTO R. ARMIJO
vs.
BARBARA CHAVEZ DE ARMIJO.

TERRITORY OF NEW MEXICO,
County of Bernalillo.

I, William D. Lee, having been heretofore appointed referee in the above-entitled cause by said court, do solemnly swear that I will faithfully and fairly hear and examine the cause and make a just, impartial and true report, according to the best of my understanding.

WM. D. LEE.

Subscribed and sworn to before me this 5th day of May, A. D. 1898.

HARRY F. LEE,
Notary Public.

(Endorsed: Filed in my office this August 18, 1898. Harry P. Owen, clerk.)

17 And thereafter, on to wit, the 18th day of August, A. D. 1898, there was filed in the office of the said clerk of said court, the oral testimony taken before Hon. W. D. Lee, the referee in said cause, which said testimony is in words and figures following, to wit:

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TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court.

JUSTO R. ARMIJO, Plaintiff, }
vs. } No. 4728.
BARBARA CHAVEZ DE ARMIJO, Defendant. }

Be it remembered, that on the trial of the above-named cause, the following proceedings, among others were had and that the
18 evidence hereinafter set forth was introduced and that the objections and exceptions made and taken to such evidence as hereafter appears, were made and taken at the time the evidence was offered, and the rulings of the court were made as to the same as is set forth in such evidence, and that the evidence hereafter set out was all the evidence introduced and was received on the trial of said cause:

In the District Court, County of Bernalillo, Territory of New Mexico.

JUSTO R. ARMIJO }
vs.
BARBARA CHAVEZ DE ARMIJO. }

On this 5th day of May, A. D. 1898, now come the parties to this cause pursuant to notice heretofore given in accordance with law, by me as master, and the taking of proofs is commenced.

Present: William D. Lee, master; Neill B. Field, attorney for plaintiff; H. L. Warren, attorney for defendant.

Mr. JUSTO R. ARMIJO takes the stand as the first witness in his own behalf and after having been duly sworn to tell the truth, the whole truth and nothing but the truth, testifies as follows:

Direct examination by Mr. FIELD:

Q. What is your name?
A. Justo R. Armijo.
Q. You are the plaintiff to this suit?
A. Yes, sir.
Q. State whether or not you ever had any contract with Barbara Chavez de Armijo whereby you undertook to perform any service for her.
A. I had a verbal contract first.
Q. Was that contract afterwards reduced to writing?
A. Yes, sir.
19 Q. Where is the original contract?
A. It has been mislaid in my papers in my office and I have not been able to find it.
Q. When and where did you last see it?
A. On or about the tenth of January, 1897, in my office, N. T. Armijo building.

Q. State whether or not you have made diligent search for that contract since that day and are you now able to state that the same is not in your pos-sion?

A. I have and the same is not in my possession.

Q. Do you know whether or not there is a copy of that contract in existence?

A. Yes, sir.

Q. Is there such a copy in existence; if so, where is it?

A. It is in the copy letter writer of Mrs. N. T. Armijo's.

Q. You mean the letter-press book?

Mr. WARREN:

Q. Where is that letter-press copy book, if you know?

A. That letter-press copy book is now in this office.

Mr. WARREN: The defendant states that the letter-press copy book in question is here in court in possession of the defendant upon whom no notice to produce the copy referred to of the agreement of February 8th, 1891, has been served, but that the defendant is ready and willing and does now produce the same for the use of the plaintiff, in obedience to the direction of the referee.

Q. Can you turn to the copy of that contract about which you have testified in that book (handing witness book)?

20 A. I can by looking at the index.

Defendant states that the copy of the contract referred to is found on page 947 of her letter-press copy book produced here by her.

Q. Look at page 947 of that letter-press copy book and state whether or not that is the copy of the contract about which you have testified?

A. This is not a copy of the contract I referred to.

Q. Is there in the book in which you hold in your hand a copy of the contract to which you do refer, if so can you turn to it?

A. Yes, sir; I will look in the index and see. I don't find it in the index, but I think I have the page in my memorandum, 988. It is not in here the leaf is out, and it is not in the index. I had it in the index here.

Q. When and where did you last see the copy of the contract in that book?

A. I saw that copy of the contract in that book some time last week in Judge Warren's office, about the first of the week.

Q. Where was it in that book?

A. In the press book, page 988.

Q. Is it or not a fact that page 988 has been torn out of that book since you examined it in Judge Warren's office?

A. Yes, sir.

Q. State whether or not any other person or persons examined that book with you in Judge Warren's office and if so who?

A. Mr. Field saw that contract there. N. B. Field and Don Jesus Garcia.

Q. State whether or not you know what became of that page 988 in that book?

A. I do not know sir.

Q. You remember the substance of that contract?

21 A. Yes, sir.

Q. State it?

Mr. WARREN: We submit that sufficient foundation has not been laid for this witness' oral statement of the contracts of that paper.

MASTER: You have the right to cross-examine him on that question before the secondary evidence will be admitted.

By Mr. WARREN: Mr. Armijo, you are the plaintiff in this action are you not?

A. I suppose so.

Q. Well, you are, are you not?

A. Yes, sir.

Q. Have you not had access and possession of that letter-press copy book you have referred to for a number of days last past and had it in your actual possession every day for some days last past?

A. I have had access to the book, but not in my actual possession.

Q. Do you mean that you have not had the book itself in your manual possession with full liberty?

A. I said I had access to the book in your office, of Warren, Fergusson and Gillett.

Q. Who, if any one, representing the defendant was present during the period that you have had this book in your hands and unrestricted control and possession?

A. You were there in the office yourself, Judge, and Mr. Gillett and the young lady working the typewriter, Miss Sommers.

Q. Do you wish to say, Mr. Armijo, that any one of the persons you have mentioned were present in the same room with yourself of the office of Warren, Fergusson and Gillett while you had

22 this letter-press copy book in your hands and possession?

A. I do say, sir, they were there with the door open from one room to the other all the time, while I was there.

Q. Were any of them present in the same room where you had this book while you were examining it?

A. They were in and out all of the time.

Q. Will you look at this book now shown you and state where the copy of the contract which you have referred to as having been contained on page 988 of that book is indexed and by whom so indexed?

A. Yes, sir, here it is indexed.

Q. On what page and by whom?

A. Page C of the index, the contract on page 988, and 988 is out.

Q. My question was by whom that entry of the index of the contract on page 988 was made, and in whose handwriting?

A. The index is in my handwriting.

Q. Will you look at page C of the index and state in whose handwriting all of the preceding entries on that page were made?

A. Some entries here made in my handwriting.

Q. Will you please specify them and in whose handwriting the other entries are made?

A. The other entries are in the handwriting of Nicolas T. Armijo, deceased.

Q. Specify the entry preceding the last one on that page and state which of such entries were made by you or are in your handwriting?

A. 944 and 962, there are some others here which are figures interlined, here is another one, 901; that is about all I guess.

23 Q. In your last answer in which you mention certain numbers upon page C as being in your handwriting, you refer entirely to numeral figures do you not?

A. Yes, sir, to the figures.

Q. Is there any other entry on that page of the index of writing except the last entry of the word "contract 988" written by you or in your handwriting?

A. I do not recognize anything there, except those figures.

Q. Which figures are the ones you named in your preceding answer?

A. I named here figures "944," "962," and I think "905," by looking close I may find some others, but that is all I can see now.

Q. Where is the original contract you have mentioned as having been copied in this letter-press copy book upon page 988?

A. I do not know, sir.

Q. Was it executed in duplicate or not?

A. No, sir.

Q. Was the original ever in your possession?

A. In my possession?

Q. Yes, sir.

A. Yes, sir.

Q. Did you ever give notice to the defendant in this case to produce any duplicate or copy of the contract you referred to, as having been copied on page 988 of this book? Upon this trial or at any time, and when for the first time do you state upon your oath you discovered that the alleged contract or copy of the same has been removed from the copy book in question?

24 Mr. FIELD: So far as the question asked of the witness whether the witness ever gave notice to produce the papers I object on the ground, first, that it is no part of the business of a party to a suit to give notice to produce papers at a trial, but that is the business of counsel and the record of this case shows that on the 20th of April, 1898, the defendant was required to deposit the letter-press copy book in question in the office of the clerk of this court by an order of the court.

MASTER: Sustained.

Mr. WARREN: We except.

A. Today, I discovered it when the book was handed to me since I went on the witness stand here.

Q. When do you state you last saw the page 988 of this book con-

taining as you state the copy of contract referred to in its proper place in this book?

A. I don't remember the day exactly, but it was some time before the book was taken over to Mrs. Armijo's house one day or two, from Judge Warren's office. (Answer continued.) I think it was on or about the 25th of April.

Q. Mr. Armijo, will you look at the page letter G of the letter book in question and state in whose handwriting the entry Gilmore & Company and the figures following 977, 988, 993, 995, 978, 980, 986, and the figures following which are indistinct, but which appear to be 992, respectively are?

A. I think they are all in my handwriting, all of them.

Q. At what date, Mr. Armijo, do you state that the letter-press copy book to which you have referred and which is marked for identification "1" was first produced and submitted to you for examination at the office of Warren, Fergusson & Gillett, and
25 for how many days did you have the same in your hands at that office for that purpose?

A. The book was in your office from the 20th to about the 26th or 27th of April last.

Questions by Mr. FIELD:

Q. Did you tear page 988 out of this book?

A. No, sir.

Q. Do you know who did?

A. No, sir; I do not.

Q. Was it torn out with your knowledge, consent, or connivance?

A. No, sir.

Q. Between the 20th and 26th or 27th of April, while this book was in the office of Warren, Fergusson & Gillett, there was also there the books kept by you in connection with this business and the monthly statements rendered by you to Mrs. Armijo, were there not?

A. Yes, sir.

Q. State whether or not you were engaged during that period continuously in examining these various books and papers, or how many hours each day you were engaged in making that examination?

A. Some days I used to go there in the morning and stay there about an hour, then I would go in the afternoon after banking hours say half past three or four o'clock, some days I wouldn't go at all, average about an hour and a quarter or an hour and a half a day.

Q. Did you see this book marked No. "1" for identification between April 27th and May 5th?

A. No, sir.

Q. Do you know where the book was during that time?

26 A. Of my own knowledge, the book was over to Mrs. N. T. Armijo's house.

Q. Did you make any effort to see the book after the 27th of April?

A. Yes, sir, I told Mr. Gillett I wanted to see that book again and he told me he would get it.

Q. Did you take a copy from this book of the contract which you say was on page 988?
A. Yes, sir.
Q. Have you got it?
A. Yes, sir.
Q. Produce it.
—. ——.
Q. Is that a correct copy?
A. Yes, sir, that is an original copy.
Q. What do you mean by an original copy?
A. I just copied it from the book.

Mr. WARREN: The defendant objects to the introduction of the alleged copy for the reason that proper foundation has not been sufficiently laid for the introduction of the same as secondary evidence of the contents of the alleged agreement or contract.
Mr. FIELD: I do now offer in evidence the copy.
Mr. WARREN: I renew my objection as made above.
Mr. FIELD: I ask the master to overrule the objection on the ground that it does not point out in what ground wherein the foundation is defective.
MASTER: I will overrule the objection of defendant.
Mr. WARREN: Defendant excepts.

Q. State, Mr. Armijo, whether or not the contract of which you say this paper, Exhibit "2," is a copy, was executed by you and the defendant in this case, and if so when and where?
A. On June 20th, 1892, at the office which they had at the residence of Mrs. N. T. Armijo.

27 (Copy of paper or paper above referred to and admitted under ruling of master is marked Complainant's Exhibit "2.")

Q. Well what happened there?
A. She asked for written agreement, I wrote the same and she signed it and I signed it myself.
Q. Then what was done with it?
A. It was copied in the letter book in the same book that we had another agreement copied previous to that.
Q. What was done with the original?
A. I took the original and she retained the book.
Q. For what period or time did you continue to work for defendant under that agreement?
A. Five years.
Q. What did you do?
A. Kept the books, kept double-entry books, kept single-entry books for the N. T. Armijo building, collected the rents for herself and the whole family.
Q. When was the N. T. Armijo building constructed?
A. The N. T. Armijo building was ready for occupancy February, 1893.

Q. How much of your time and attention did you give to the business of Mrs. N. T. Armijo?

Mr. WARREN: Objected to as immaterial.

MASTER: Overruled.

Mr. WARREN: Except.

A. I devoted my entire time and I was always at their disposal night and day.

Q. When did you cease — for Mrs. N. T. Armijo under that contract?

A. 31st day of December, 1896.

Q. Did you keep any books of your doings?

A. Yes, sir.

Q. Where are they?

28 A. These are the books.

Q. From what custody do they come, who produced them here?

A. Mrs. N. T. Armijo's attorney or her agent.

(In pursuance of the notice which was filed, defendants produce and there is delivered into custody of the referee seven books of account and 38 statements, and counsel for defendant states that this is all they can produce under the notice.)

Q. State, Mr. Armijo, whether or not during the period mentioned, you made any advancements of money on account of defendant, and if so whether or not the same are shown upon the books and statements kept and rendered by you to the defendant?

A. Yes, sir, I advanced money and it is shown on the books.

Q. State what if anything is now due to you from the defendant on account of services rendered under contract about which you have testified, and on account of moneys advanced by you as you have stated?

A. Up to December 31st, 1896, the amount due me was $9,870.31.

Q. How is that amount reached by you?

A. I worked there five years and I advanced $3,717.65 out of my own money.

Q. How much does that amount to?

A. That amounts to—I arrived at that according to my last statement I made, I have a copy of it here in this book, I worked for Mrs. Armijo for five years at the rate of $2,500 a year, I had a note I borrowed six thousand dollars from Mrs. Armijo at the rate of four per cent. per year, it took me two years and seven months and twenty-six days to pay the note with interest with my salary, the note for six thousand dollars with interest two years and seven months and

29 twenty-six days at the rate of four per cent. is $6,637.33, my salary was $2,500 a year in two years and 7 months and twenty-six days. I had paid up $6,638.77, that left in my favor $1.44, now the balance of my time was two years four months and four days that is $5,861.10. I advanced money out of my own pocket for her business $3,717.65, there is interest due on that money of $290.12 at the rate of four per cent., now by adding the $1.44 I had

balance before makes the sum of $9,870.31 and from January 1st, 1897, to now would be one year and five months more at the rate of four per cent. would make, I mean at the rate of six per cent., $838.97 interest makes a total balance to the end of the month $10,709.28.

Q. State whether or not any part of that balance of $10,709.28 has been paid?

A. No, sir.

Q. Look at the papers shown you marked from 1 to 38 both inclusive and state what they are?

A. No. 1 is monthly statement from October 1st, 1893, to November 1st, it is a statement showing receipts and expenditures of the N. T. Armijo and money delivered to Mrs. N. T. Armijo that is it is a statement of the business done by me for Mrs. N. T. Armijo for that month.

No. 2 consists of two papers and is a similar statement for the month of November, 1893.

No. 3 consists of two papers which are the receipts of rents and the expenditures for December up to January, the end of January, 1894.

No. 4 consists of two papers which are the receipts of January and the expenses to the last of February, 1894.

30 No. 5 consists of two papers which are March rents and expenses for March.

No. 6 consists of two papers which are rents for March and expenses for April.

No. 7 consists of two papers which are for rents collected in May and expenses for May.

No. 8 consists of two papers which are for rents collected for June and expenses for June.

No. 9 consists of two papers which is July 1st to August 1st, rents and expenses of July.

No. 10 consists of rents for August 1st to September 1st, and expenses of August.

No. 11 consists of two papers from September 1st to October 1st rents, and expenses for the same time.

No. 12 consists of rents, collected from October 1st to November 1st and expenses for October. (Two papers.)

No. 13 consists of two papers rents collected for November 1st to December 1st and expense of November.

No. 14 consists of two papers and is for rents of December 1st to January 1st and expenses of December.

No. 15 consists of two papers rents from January 1st to February 1st and expenses for January.

No. 16 consists of two papers rents from February 1st to March 1st and expenses for February. (The last two being dated 1895.)

No. 17 consists of two papers rents from March 1st to April 1st, 1895, and expenses for March.

No. 18 consists of two papers rents from April 1st to May 1st, expenses for April, 1895.

No. 19 consists of two papers rents from May 1st to June 1st, expenses for May, 1895.

No. 20 consists of two papers rents from June 1st to July 1st, being expenses for June.

31 No. 21 consists of two papers being for rents from July 1st to August 1st, expenses for July.

No. 22 consists of two paper- being rents from August 1st to September 1st, expenses for August.

No. 23 consists of two papers being for rents from September 1st to October the 1st, and expenses for September.

No. 24 consists of two papers rents from October to November, expenses for October.

No. 25 consists of two papers rents from November 1st to December 1st, expenses for November.

No. 26 consists of rents of November and expenses of December.

No. 27 consists of two papers rents of December and expenses of January.

No. 28 consists of rents of January, 1896, and expenses of February.

No. 29 consists of rents of February and expenses of March.

No. 30 consists of two papers rents of March and expenses of April.

No. 31 consists of rents of April and expenses of May.

No. 32 consists of rents of May and expenses of June, two papers.

No. 33 consists of two papers rents of June and expenses of July.

No. 34 consists of rents of July and expenses of August.

No. 35 consists of rents of August and expenses of September.

No. 36 consists of rents of September and expenses of October.

No. 37 consists of rents of October and expenses of November.

32 No. 38 consists of two papers being rents of November and expenses of December, 1896.

Mr. FIELD: I offer these thirty-eight statements which are marked respectively Plaintiff's Exhibits from "3" to "40."

Q. State, Mr. Armijo, whether or not you rendered to the defendant any statements which are not produced here by defendant.

A. Yes, sir.

Q. Have you copies of those statements?

A. Yes, sir.

Q. Will you produce them?

A. Yes, sir.

Q. What are these statements which you now produce?

A. They are copies of the annual statements.

Q. Of what annual statements?

A. What we call in book-keeping annual trial balance.

Q. Annual trial balance of what books?

A. The double-entry books of Mrs. N. T. Armijo.

Q. Kept by whom?

A. Kept by J. R. Armijo.

Q. State whether or not you have ever delivered to Mrs. N. T.

Armijo a trial balance of which the paper marked for identification Exhibit "41" is a copy.

A. Yes, sir.

Q. When?

A. December, 1891.

Q. What time in December, 1891?

A. At the end of the month, I generally made them at the end of the year in December.

Mr. FIELD: I offer paper marked for identification Exhibit
33 "41" in evidence. Paper admitted and marked Exhibit "41."

Q. State whether or not you ever delivered to the defendant trial balance of which Exhibit No. "42" is a copy.

A. Yes, sir.

Q. When?

A. The last of December, 1892.

Mr. FIELD: I offer Exhibit No. "42" in evidence which is marked Exhibit No. "42."

Q. State whether or not you ever delivered to the defendant trial balance of which Exhibit No. "43" is a copy.

A. Yes, sir.

Q. When?

A. The last of December, 1893.

Mr. FIELD: I offer Exhibit "43" in evidence which is marked Plaintiff's Exhibit "43."

Q. State whether or not you ever delivered to the defendant trial balance of which Exhibit No. 44 is a copy.

A. Yes, sir.

Q. When?

A. The last of December, 1894.

Mr. FIELD: I offer Exhibit No. 44 in evidence, which is marked Complainant's Exhibit "44."

Q. State whether or not you ever delivered to the defendant trial balance of which Exhibit No. "45" is a copy.

A. Yes, sir, the last of December, 1895.

Mr. FIELD: I offer Exhibit No. "45" in evidence, which is admitted and marked Plaintiff's Exhibit No. "45."

Q. State whether or not you ever delivered to the defendant trial balance of which Exhibit "46" is a copy.

34 A. Yes, sir; I did.

Q. When?

A. The last of December, 1896.

Mr. FIELD: I offer Exhibit No. "46" in evidence, which is marked Plaintiff's Exhibit "46."

Q. Look at the book now shown you marked Exhibit No. "47" and state what it is.

A. That is a journal kept in the double-entry business of Mrs. N. T. Armijo.

Q. What do you mean by the double-entry business of Mrs. N. T. Armijo?

A. I mean the double-entry books for the business of Mrs. N. T. Armijo.

Q. State whether or not it contains a correct record of your transactions of the business of Mrs. N. T. Armijo.

Mr. WARREN: Object as leading.

A. Yes, sir; it does.

Journal offered in evidence and marked Plaintiff's Exhibit "47."

Q. Look at the book now shown you marked Exhibit "48" and state what it is.

A. This is a ledger of the books that were kept in double entry of the business of Mrs. N. T. Armijo.

Q. Kept by whom?

A. By J. R. Armijo.

Q. By you?

A. Yes, sir.

Q. What does that ledger contain?

A. It contains all the transactions, money that she loaned out and expenses that she had and money that she collected, money she paid out for this N. T. Armijo building and a good many other amounts.

Q. Has it any connection with that journal exhibit "47"?

35 A. Yes, sir.

Q. What?

A. The journal is the key to the ledger.

Q. What do you say as to whether or not the entries in that ledger are correct?

A. I say that they are correct.

Mr. FIELD: I offer ledger in evidence which is marked Exhibit "48."

Q. Were there any other books in that set?

A. No, sir; there was only the journal and the ledger.

Q. Look at book shown you marked Exhibit "49" and state what it is?

A. It is an expense book.

Q. Kept by whom?

A. By J. R. Armijo.

Q. For what?

A. For the purpose of keeping the amount of money expended for the minor heirs of Mrs. N. T. Armijo's business.

Q. What have you to say as to whether or not the entries in that book are correct?

A. I say that they are correct.

Mr. FIELD: I offer Exhibit "49" in evidence which is marked Plaintiff's Exhibit "49."

Q. Look at the book shown you marked Exhibit No. "50" and state what it is?

A. This is a cash book kept of the N. T. Armijo building, by J. R. Armijo showing the amount of receipts and expenditures of every month.

Q. In whose handwriting are the entries in this book subsequent to page 43?

A. Mr. Dieckmann's.

Mr. FIELD: I offer Exhibit No. 50 beginning on page 1
36 and ending on page 42 both pages inclusive which are marked Plaintiff's Exhibit "50."

Q. Look at book shown you marked Exhibit "51" and state what it is.

A. It is the ledger kept of the N. T. Armijo building.

Q. By whom?

A. By J. R. Armijo.

Q. What have you to say as to the connection of that book and Exhibit No. "50" and whether or not the entries in the book are correct?

A. They are correct, one is the key of the other.

Mr. FIELD: I offer Exhibit No. 51 in evidence which is marked Plaintiff's Exhibit "51."

Q. Look at the book shown you marked No. "52" and state what it is.

A. This book was kept by J. R. Armijo shows the account of the labor at Mrs. N. T. Armijo's residence.

Mr. FIELD: I offer so much of this book as is subsequent to page "15" beginning on page 16, which is marked Plaintiff's Exhibit "52."

Q. Look at the book shown you marked Exhibit "53" and state what it is.

A. Property partition of the N. T. Armijo, deceased, estate.

Q. In whose handwriting are the entries in that book?

A. My handwriting.

Q. What do you say as to whether or not the entries are correct?

A. They are correct.

Mr. FIELD: I offer Exhibit "53" in evidence which is marked Plaintiff's Exhibit "53."

Q. Where did you live and what was your business prior
37 to the time when you entered into the contract with defendant about which you have testified?

A. I lived in the town of Bernalillo, county of Bernalillo, and I was in the sheep business.

Q. What if anything did you do with reference to changing your residence in order to attend to your duties under that contract?

Mr. WARREN: Defendant objects as immaterial.

MASTER: Overruled.

Mr. WARREN: Exception.

A. I sold out my sheep because I couldn't attend to them any more on account of taking this other contract.

Q. Did you continue to live at Bernalillo?

Mr. WARREN: Objected to as immaterial.

MASTER: Overruled.

Mr. WARREN: Exception.

A. No, sir, I moved to Albuquerque.

Q. When you ceased to work for the defendant under this contract what business did you go into?

A. Real estate and insurance.

Q. Did you have any other business?

A. County assessor.

Q. What were your services reasonably worth per annum during the five years that you stated you were employed by the defendant?

Mr. WARREN: Objected to as immaterial the action being based upon an alleged written agreement.

MASTER: Overruled.

Mr. WARREN: Exception.

A. My services are worth twenty-five hundred dollars a year, and I wouldn't do that work again for the same money.

38 It now being near adjourning time at request of defendant an adjournment is taken until tomorrow morning, Friday, May 6th, 1898, before cross-examination.

Friday, May 6th, taking of proofs adjourned until Thursday, May 12th, 1898.

Thursday morning, May 12th, 1898, the taking of proofs resumed pursuant to adjournment.

Cross-examination by Mr. WARREN:

Q. Mr. Armijo, what kinship or relationship existed between you and the deceased N. T. Armijo?

A. He was my brother.

Q. Will you look at this letter-press copy book, marked "1" for identification, and state if you know in whose handwriting the body of the instrument copied on page 947 of said book is and also in whose handwriting the signature thereto of Barbara Chavez de Armijo is?

A. The agreement is in my handwriting, the signature is of Mrs. N. T. Armijo.

Q. You mean this defendant do you not?

A. Yes, sir.

Q. At what time, with reference to the date said instrument bears of February 8th, 1891, was the said instrument in fact executed?

Mr. FIELD: Objected to as not being proper cross-examination this not being any instrument as to which witness testified on his examination-in-chief.

MASTER: I will let question be asked.
Mr. FIELD: Exception.

A. On the 8th of February, 1891.

Q. Where is the original of that instrument if you know?

39 A. I couldn't tell you.

Q. At the time it was made, Mr. Armijo, was there more than one copy or was it executed in duplicate?

A. No, sir; the original I was supposed to have myself and the book Mrs. N. T. Armijo was supposed to have, which book was in her possession.

Q. You have stated have you not that such was also the case in reference to the agreement you refer to bearing date June 20th, 1892, and which was copied on page 988, as you have stated, and which page of the book you have stated has been recently torn out or removed by some one?

A. Yes, sir.

Q. State to the court if both of these originals were not regarded by you as important papers?

A. Yes, sir; they were very important to me.

Q. Yet you state on your direct examination in regard to this last-named paper that you had made diligent search for it and had been unable to find it at the time of your direct examination, now will you state when and where you last saw the original of the paper, the copy of which appears upon 947 of the book?

A. On or about the 10th of January, 1897.

Q. When did you last see that paper,—where was it at that time?

A. In my office.

Q. At what place in what building?

A. N. T. Armijo building.

Q. Was it at that time or not together with the agreement you have mentioned dated June 20th, 1892?

A. I think they were.

Q. How frequently previous to the date when you say you

40 last saw them had you seen these agreements you have mentioned after their execution respectively?

A. I looked at my papers and saw them there on January 5th, 1897.

Q. Question repeated.

A. I think I saw them very frequently there in the office, but I never took any particular note of it.

Q. Was there or not any witness to the execution of either one of these agreements at the time you say they were executed?

A. Which contract do you refer to, the first or the second?

Q. Question repeated.

A. To the first one I do not remember, to the second one there was a servant in the office when I read the contract of Mrs. N. T. Armijo.

Q. Did such servant or any one else sign the instrument as witness to the same?

A. No, sir; only the two in the contract signed it.

Mr. WARREN: I desire to offer the instrument on page 947 of this copy book.

Mr. FIELD: To which plaintiff objects because first, this is not the time for the defendant to be offering evidence in the case.

MASTER: Sustained.

Mr. WARREN: I offer it for identification.

Paper is marked for identification "Defendant's Exhibit 1."

Q. Mr. Armijo, will you please look at the letter now shown you bearing date January 2nd, 1897, and marked for identification Defendant's Exhibit "2," and state in whose handwriting the body as well as the signature of the same is?

A. That is my handwriting, sir, and the signature the same; a statement went with that same letter.

41 Q. What was done with that letter that you state is in your handwriting, what did you do with it?

A. I sent it to her, the defendant.

Q. Was there any other instrument enclosed with this letter and delivered to the defendant Mrs. Armijo?

A. Yes, sir.

Q. What was it?

A. A statement.

Q. Anything except the statement, was there not in other words a check as indicated in this letter for $58.89, made by you payable to her order?

A. Yes, sir.

Q. When did you next see any of the enclosed papers referred to after delivering or sending them to Mrs. Armijo?

A. Next day.

Q. In whose possession and what was done with those papers?

A. I have them in my possession.

Q. Both the statement and the check referred to?

A. I don't remember if I kept the check, but I kept the statement.

Q. Will you now please produce the statement referred to without further notice?

A. Yes, sir.

A. Here is the statement and here is the letter she returned.

Papers produced by witness marked for identification Defendant's Exhibit "3." One of the same purporting to be a statement dated January 1st, 1897, and the other purporting to be a letter signed Mrs. N. T. Armijo, dated January 2nd, 1897.

Q. Mr. Armijo, during the entire period in which you were

42 in the employ of Mrs. Armijo as administratrix of the estate of Mr. N. T. Armijo or individually did you or not have the letter-press book and the various account books which you have offered in evidence in your possession and under your control?

A. I had them in their own office in the house.

Q. Under your control were they?

A. Yes, sir.

Q. At the time of the rendition of this account which you have produced as late as January 1st, 1897, had you forgotten the existence of the agreement you have now produced here bearing the date June 20th, 1892.

A. Not by any means.

Q. You knew at that time and all times subsequent to its date did you of the existence of such contract?

A. Yes, sir, I was fully aware of its contents.

Q. From whose possession did you receive the letter-press copy book identified as "1" at the time you say you examined the same at the office of Warren, Fergusson and Gillett in the month of April last?

A. I suppose from the possession of Mrs. N. T. Armijo, but the book was there at the office of Warren, Fergusson and Gillett.

Q. At the time you so received said letter-press copy book do you state that the copy of the agreement you have mentioned dated June 20th, 1892, was contained upon page 988 of that book?

A. I have never received the book; I had access to it in the office of Warren, Fergusson and Gillett as stated before.

Q. You take exception to the question because it uses the
43 term that you received the book instead of saying that you had access to the book, do you?

A. I made exception because I never received the book and was never in my power.

Q. Do you now state that the copy of the agreement bearing date June 20th, 1892, was contained upon page 988 of the letter-press copy book marked "1" for the identification at the time you had access to the same in the office of Warren, Fergusson and Gillett during the month of April, last?

A. I say sir, that on the 23rd of April and the 25th of April, 1898, that contract referred to was in that book.

Q. The original of said contract you have stated was taken by you and has been lost or mislaid so that you have been unable to find it to introduce in evidence here, have you since your direct examination made any further search for said original?

A. Yes, sir, I have.

Q. Do you know where it is?

A. I do not, it might have been that it was stolen out of the desk.

Mr. WARREN: I ask the referee to strike the last part of witness's answer from the record as not being responsive and wholly improper.

MASTER: It will be stricken out.

Q. At the time the letter-press copy which you have stated was contained upon page 988 was made did or did not the defendant Mrs. Armijo know that such copy was so made upon said page of said book?

A. My opinion is that she did, because all the contracts were generally copies there.

Q. Have you not already stated that the only copy which she re-

tained of the agreement in question was the letter-press copy upon that page of the book?

44 A. Yes, sir.

Q. Then can you not answer directly the question as to whether the defendant knew that said copy was so contained in the book at the time the same was produced by her and you were given access to the same in April last in the office of Warren, Fergusson and Gillett?

A. I fully understand that she was aware that the copy was in that book.

Q. Mr. Armijo, will you look at letter G page of the index to the letter-press copy book in question and state if you can when and by whom the defacement or alteration which was apparent of the figures 992 were made and what the original figures were in said place.

A. I can't say, sir; they look like my figures, but I can't say.

Mr. WARREN: I would like that page identified.

MASTER: It is identified in your question fully.

Redirect examination by Mr. FIELD:

Q. State, Mr. Armijo, the circumstances under which the two contracts about which you have testified disappeared.

A. On or about the first of January, 1897, after my resignation had been accepted, Juan C. Armijo had a key to my office, he returned that key on or about the 3rd or 5th of January the same year, saying that he had no more service for it; on or about the 10th or 11th of the same month he came in there and asked Mr. Culley for the key; Mr. Culley let him have the key——

Mr. WARREN: Of course we make the formal objection as to this hearsay evidence.

MASTER: Sustained.

45 A. About the 18th of January he returned the key, saying he had no further use for it, during that time those papers were lost out of my desk.

Q. Was the key returned to you by Mr. Juan C. Armijo?

A. It was retured to Mr. Culley.

Q. Who is Mr. Culley?

A. Mr. Culley is my partner and occupies the same office as I do.

Q. George C. B. Culley?

A. Yes, sir.

Q. Did you at any time between the 5th and the 18th of January notice anything about your desk that was unusual?

A. About the 16th, I think it was, on the 16th of January, I came on the train from Bernalillo as was customary. I walked right straight up to my office, went to open my desk and the key caught, after I had a little trouble opening it I found all my papers turned upside down in my desk.

Q. Was that desk kept locked or unlocked?

A. That desk was locked all the time.
Q. Had any other person a key to it besides yourself?
A. No, sir.
Q. State, Mr. Armijo, the circumstances under which you wrote the letter of January 2nd, 1897, identified as Defendant's Exhibit "2" and made the statement under date of January 1st, 1897, which is attached to Defendant's Exhibit "3" for identification?
A. I made this statement in an agreement I had made another statement previous to this, but Mrs. Armijo seemed to think that I was reaping the profits of the business and the business did
46 not produce what was anticipated, and if they will produce the other statement I will explain this one.
Q. Can't you explain this statement that you have without the other?
A. Yes, sir; I can give the explanation of what happened. Mrs. Armijo stated this to me, that the business had been very dull; that everything had been unsatisfactory to her, she thought my salary was too high; I answered her that it is not my fault that the panic had come on and everybody had suffered equally and to avoid any difficulty in the matter in place of charging her my regular twenty-five hundred dollars per annum I would compromise the matter for the five years for three thousand dollars, and upon that agreement I sent her this statement, after I sent her the statement she returned it.
Q. At the time you told her that you would agree to take three thousand dollars for your services by way of compromise what if anything did she say with reference to that proposition?
A. She accepted it, and said it was all right; to send her the statement and it would be all right.
Q. And that statement was made in pursuance of an agreement for a compromise which was not carried out?
A. No, sir; it was not carried out.
Q. Was the statement made in pursuance of an agreement which was not carried out or wasn't it?
A. This agreement was not carried out as I sent a statement previous to this.
Q. Was or was not the statement which is attached to Defendant's Exhibit "3" made by you on account of the agreement to compro-
mise which you say was not carried out?
47 A. I say that this compromise was not carried out.
Q. You said on your cross-examination that there was a servant in Mrs. Armijo's office when you read to her the contract about which you testified; what was the name of that servant?
A. Maximo Griego.
Q. State whether or not the contract shown you from cross-examination copied on page 947 of the letter-press copy book had been fully performed by you and by the other party to it?

Mr. WARREN: Object as leading and irrelevant on the issues here.
MASTER: Witness may answer.
Mr. WARREN: Exceptions.

A. Yes, sir; it was fully performed.
Q. Was there or not upon page 988 of that letter-press copy book any other paper copies besides the contract about which you have testified?
A. I don't remember.

Recross-examination by Mr. WARREN:

Q. How was it, Mr. Armijo, that there was no witness to this paper you have referred to as having been copied on page 988 if as you say a person named Maximo Griego was present at the time the paper was read over by you to Mrs. Armijo?
A. We never had any witnesses in our contracts.
Q. Then do I understand your reason is that you did not regard it necessary to have any witness to the paper?
A. I didn't think so at the time.
(Signed) J. R. ARMIJO.

Plaintiffs here rest their case.

48 ELOISE ARMIJO, called as witness for the defendant, being first duly sworn to tell the truth, the whole truth, and nothing but the truth, testifies as follows:

Direct examination by Mr. WARREN:

Q. You will please state your name and residence.
A. Eloise Armijo, Albuquerque, New Mexico.
Q. What relation if any are you to the parties to this suit?
A. I am Mr. Armijo's niece, and Mrs. Armijo's daughter.
Q. Where have you resided and with whom since the year 1890?
A. Until June, 1891, I was at school, then I came back and stayed until August; I came home for good in March, 1892.
Q. What do you mean by home and with whom did you live?
A. I was at school and then I came and lived with my mother, the defendant in this case.
Q. Will you look at this letter-press copy book now shown you and state whether you have seen it before, prior to this time, during what periods, and if you know for what purpose the same has been used?

(Book referred to being book heretofore marked for identification "1.")

A. I have seen it very frequently before, I don't remember what periods I have seen it, it has been used as a copy book.
Q. Will you look at page No. 988 of that book or at the place formerly occupied in that book by page 988 and state if you know what letter or document was copied upon said page?
A. From the index there was a letter to Gillmore and Company.
49 Q. What index do you refer to, upon what page?
A. The only mark on the page is G.

Q. State if you know in whose handwriting the index to page 988 on said page G is.

A. It looks like Mr. Armijo's writing.

Q. What Mr. Armijo?

A. Mr. J. R. Armijo, plaintiff in this case.

Q. I will get you to state, Miss Armijo, if you have any means of knowing the whereabouts of the original writing the copy of which appears by the index on page letter G to have been copied on that page 988?

A. I think that it is the letter the judge has in his hand.

Q. Please look at and identify this letter now shown you and state if that is the letter to which you referred in your last answer.

A. Yes, sir, this is the one I mean.

(Paper marked for identification Defendant's Exhibit 4.)

Q. Will you look at this Exhibit No. "4" and state if you know in whose handwriting the same and the signature thereto is.

A. Mr. J. R. Armijo's writing.

Q. State if you know how the letter in question, Exhibit No. "4," came into your possession or hands.

A. We sent for it to San Diego.

Q. To whom and in what manner did you so send?

A. To Mr. Gillmore, by telegraph.

Q. And by what means was it transmitted to you?

A. By registered mail.

Q. At what time?

A. May 6th, 1898, it left San Diego.

50 Q. Do you know what has become of what was formerly page 988 of the letter-press copy book you have in your hand?

A. I do not know what has become of it.

Q. Did you ever see that page 988 of that book?

A. Yes, sir.

Q. Was there or not any thing else copied upon that page 988 except this letter to Messrs. Gillmore and Company, marked for identification, Defendant's Exhibit No. "4."

A. No, sir, there was nothing else copied on that page.

Q. State how and why it is you are so able to testify?

A. Because I have looked at all the letters in this book written by Mr. Armijo, Mr. J. R. Armijo, and that is all there was on that page.

Q. Page 988 appears to have been torn out of the book in question does it not?

A. Yes, sir.

Q. State if you know when, and by whom it was so torn out or removed from the book?

A. I do not know.

Q. Do you know at what period during the month of April last the copy book in question was in the hands of plaintiff, J. R. Armijo, and at what place?

A. Mr. Gillett came and told us that the court demanded the

books; my mother gave them up and after that I don't know where they were except in your office part of the time.

Q. Do you know whether at the time your mother gave up the book in question as you have stated in compliance to the order of the court, the page 988 of the book was contained in it or had

51 been at that time removed?

A. I do not know.

Q. When did you for the first time learn that page 988 had been taken out or removed from the book?

A. When J. R. Armijo's testimony was being taken.

Q. Do you mean the testimony taken here before Judge Lee as referee in this case last week?

A. Yes, sir.

Q. Will you please look at the paper now shown you, written in pencil, marked Plaintiff's Exhibit "2" in this case and state what if anything you know in regard to any original contract of which the same purports to be a copy?

A. I do not know anything about it; I never saw it before until I saw it in this office.

Q. Had such original contract been copied in letter-press copy book upon page 988 or upon any other page of said copy book, state whether or not you could and would have seen the same prior to April of this year?

A. Yes, sir; I could have seen it; I often had the book in my hands.

Q. And I understand you to state that you had not prior to said date seen such copy?

A. No, sir; I did not.

Q. State how frequently you were present during the years you have mentioned, with your mother, the defendant, when she had business interviews with Justo R. Armijo, the plaintiff in this case?

A. I was very frequently present.

Q. In what capacity did you act in these interviews for her?

A. In no capacity except I used to explain things to her

52 that she did not understand.

Q. In fact would she transact business except as known to you and in your presence?

Mr. FIELD: Objected to as incompetent and calling for an opinion of the witness as to what her mother was doing.

MASTER: Sustained.

Mr. WARREN: Exceptions.

Q. State to the court what the course of business was in regard to your attendance upon the transaction of business between your mother and Justo R. Armijo, the plaintiff, during the years you have mentioned?

A. The rents were collected and the accounts rendered every month.

Q. Question repeated.

A. Yes, sir, I was generally present.

Q. Look at this note now shown you and marked for identification Defendant's Exhibit 5, and state if you know in whose handwriting the signature thereto is?

A. It is in Mr. J. R. Armijo's signature.

Q. Will you look at the two checks now shown you each for the sum of $3,824.48, one purporting to be drawn upon the First National Bank of Santa Fe, the other upon the First National Bank of Albuquerque, signed by Mrs. N. T. Armijo, and state if you know in whose handwriting each one of the said checks is indorsed?

A. Mr. J. R. Armijo's handwriting.

(Checks marked for identification Defendant's Exhibits "6 and 7.")

Mr. WARREN: I offer in evidence contract on page 947 of letter-press copy book which was marked for identification "1"
53 and which page 947 was heretofore marked for identification Defendant's Exhibit "1."

Mr. FIELD: Plaintiff objects that it is irrelevant and does not relate to anything in controversy in this case.

MASTER: I will admit it.

Mr. FIELD: Save an exception.

(Which page 947 was marked Defendant's Exhibit "1.")

Mr. WARREN: Defendant offers in evidence the letter marked Defendant's Exhibit "2" for identification.

Mr. FIELD: Plaintiff objects upon the ground that it was written for the purpose of carrying out a compromise agreed upon and not perfected.

MASTER: It will not be admitted at this time; you may put in your evidence first and further identify what the paper is.

Mr. WARREN: I will offer in evidence the letter identified by the witness dated June 16th, 1892, signed Mrs. N. T. Armijo, per J. R. A., to Messrs. Gillmore and Company, San Diego, California, and which is marked for identification Defendant's Exhibit "4," which is marked Defendant's Exhibit "4," identification, Defendant's Exhibit "5."

Mr. WARREN: I will offer note which is marked for identification, Defendant's Exhibit "2."

Mr. FIELD: I object upon the ground that there is no count in defendant's plea of set-off under which the same is admissible, and upon the further ground that neither the original note nor a copy thereof was filed with the plea of set-off.

MASTER: I will admit it.

Mr. FIELD: Exceptions.

(Paper marked Defendant's Exhibit "5.")

54 Mr. WARREN: I offer check marked for identification Defendant's Exhibit No. "6."

Mr. FIELD: To which plaintiff objects on the ground that it shows upon its face that it was given long anterior to the execution of the contract sued on in this case and upon the further ground that it was given in satisfaction of the contract found on page 947 of the letter-press copy book.

MASTER: This may be admitted and I will reserve ruling.
(Check is marked Defendant's Exhibit "6.")
Mr. WARREN: I offer check which is marked for identification as Defendant's Exhibit "7."
Mr. FIELD: To which plaintiff objects upon the ground that it related to a transaction anterior to the making of the contracts out of which this suit grew and was given as a gratuity by the defendant to the plaintiff at the time of the closing of the accounts of defendant as administratrix of Nicolas T. Armijo, deceased.
MASTER: Same ruling, it will be admitted and ruling reserved.
Mr. FIELD: To the last two papers Mr. Field saves an exception to the ruling of the master.

Q. Miss Armijo, will you please look at this letter-press copy book at page C of the index and state if you know in whose handwriting the words contract 988 are? As the same appear at the bottom of the said page.
A. That looks like Mr. J. R. Armijo's handwriting.
Q. You have said you know his handwriting, have you not?
A. Yes, sir.
55 Q. State from your knowledge of that writing in whose handwriting the said word and figures is?
A. Mr. Armijo's, J. R. Armijo's handwriting.
Q. Will you please look at index, page G of the book and state if you know in whose handwriting all of the entries upon the last written line of said page are.
A. Mr. J. R. Armijo's figures, as far as I can tell, and Gillmore and Company is also in his handwriting.

Cross-examination by Mr. FIELD:

Q. Where were you on June 20th, 1892?
A. I was at home.
Q. Were you sick or well?
A. As far as I can remember I was in good health.
Q. You were an invalid confined to your bed a long period after you came from school, were you not?
A. Yes, sir.
Q. Were you not in New York for several months under treatment for some injury you had received?
A. I fell October 9th, 1893, and sprained my ankle, we went to New York to have it attended to, and remained until the following August, I believe.
Q. How old were you when you came home for good in March, 1892?
A. I was eighteen years old.
Q. Had you any business experience whatever?
A. No, sir.
Q. Did you take charge of the books in your mother's office at the house upon your return from school?
A. No, sir.
Q. When, if at all, did you take charge of them?

56 A. I never took charge of them.

Q. Do I understand up to this time you have had no more knowledge of your mother's business and no more the charge of it than your brother or your sister?

A. I have paid more attention to the business than my brother or my sister have.

Q. Isn't it a fact, Miss Armijo, that you have been the controlling spirit of that household for the last four or five years?

Mr. WARREN: Objected to as not being proper cross-examination.

MASTER: I will admit it.

A. My mother is the control-ing spirit of our household.

Q. When Mr. Gillett applied at your mother's house for two letter-press copy books, and stated that the court demanded them, to whom did he apply?

A. I do not remember.

Q. Didn't he apply to you more than once before he got the books, Miss Armijo?

A. In what respect do you mean?

Q. I mean did not Mr. Gillett come to your mother's house in quest of these two letter-press copy books, and did he not make more than one application to you for the books before you delivered them to him?

A. I have said I do not remember to whom he applied.

Q. Do you remember that he did not apply to you?

A. I do not remember.

Q. You finally delivered two books to Mr. Gillett, did you not?

57 A. I do not remember.

Q. After the book marked "1" for identification had been at the office of Warren, Fergusson and Gillett for a few days, you went in person to the office of Warren, Fergusson and Gillett and got the book and took it home did you not?

A. Yes, sir.

Q. That was about the 25th of April wasn't it?

A. It was on the 27th day of April.

Q. You kept it at home from the 27th of April, how long?

A. I do not remember.

Q. Until it was produced here in the office of Judge Lee on the 5th day of May, wasn't it?

A. I said I don't remember.

Q. Have you a copy, did you retain a copy of the telegram which you sent to Gillmore and Company about which you have testified?

A. I did not send the telegram.

Q. Who did send it?

A. Mr. Dieckmann.

Q. Did you see it before it was sent?

A. No, sir.

Q. How do you know any telegram was sent?

A. I saw a copy of it after it had been sent.

Q. Where is that copy?

A. The last I saw it, it was in Judge Warren's possession.

Mr. WARREN: I will state I have it and produce it if you desire.

Q. Who told you that this copy was a copy of the telegram that was sent?

A. Mr. Dieckmann.

Q. And that is all you know about the sending of the telegram?

58 A. That is all.

Mr. FIELD: The plaintiff moves to strike out the testimony of this witness with reference to sending a telegram to Gillmore and Company and the letter produced by the witness Exhibit "4" because it now appears that the testimony of the witness on that subject is hearsay.

MASTER: I will sustain the objection in regard to sending a telegram as hearsay and will overrule as to the objection of striking out Exhibit "4."

Mr. FIELD: Exceptions.

Mr. WARREN: Exception on the ground that the evidence was admitted without objection.

Q. When—you were not in San Diego when this letter was mailed were you, Miss Armijo?

A. Mailed by whom?

Q. By whomever it was mailed in San Diego on the 6th day of May, 1898.

A. No, sir, I was not in San Diego.

Mr. FIELD: I move to strike out the statement of witness made upon her direct examination the letter was transmitted by registered mail and had left San Diego May 6th, 1898, letter referred to being Defendant's Exhibit No. "4."

MASTER: So far as to when it was mailed I will sustain the objection, the letter being better evidence.

Questions by Mr. WARREN:

Q. Miss Armijo, it appears that you testified upon your direct examination here that the letter marked Defendant's Exhibit No. "4" which you testified is in the handwriting of the plaintiff, J. R. Armijo, was transmitted to you from San Diego on May the 6th,

59 1898, by registered mail, will you please state how you know that fact, and although you were not present in San Diego on May 6th, 1898, you were able to state the date at which said letter left San Diego?

Mr. FIELD: To which the plaintiff objects upon the ground that it is cross-examination by the defendant's counsel of her own witness and an abuse of discretion by the referee to permit cross-examination by counsel for plaintiff to be interrupted for the purpose of showing that there is other evidence in the possession of defendant by which she can prove the fact if it exists.

MASTER: Objection sustained.

MASTER: I will overrule his motion to strike out at present.
Mr. FIELD: Exception.

Q. When did you last see page 988 of the letter-press copy book Exhibit "1."
A. I don't remember.
Q. Are you positive you ever did see it?
A. Yes, sir.
Q. How many time- did you ever see it?
A. I don't know.
Q. More than once?
A. Yes, sir, more than once.
Q. Did you see it as many as ten times?
A. I don't know.
Q. Did you see it as many as five times?
A. I don't know.
Q. Did you see it twice?
A. I think I saw it more than twice.
Q. Three times?
A. I don't know the exact number of times I saw it.
60 Q. Can you tell whether you have seen it as many as three times?
A. I cannot tell.
Q. When was the first time you ever saw it?
A. I don't remember.
Q. What was the occasion of your having seen it, the first time if you remember?
A. I don't remember.
Q. Isn't it a fact, Miss Armijo, that the only way that you know that there was a letter copied on page 988 at all is that you find evidence of it in the index to that copy book?
A. No, sir.
Q. What else is it that enables you to say that there was a letter copied on page 988?
A. I said I saw the letter there.
Q. What enabled you to say that you saw the letter there, when you cannot tell when it was, where it was, or under what circumstances?
A. I know that the letter was there, these questions you ask are very exacting I cannot be as accurate as that.
Q. I was only asking you, Miss Armijo, for any circumstance, great or small, which now has lodgment in your memory and which enables you to say that on page 988 of that copy book, there was a letter copied to Gillmore and Company, and that there was nothing else copied on that page. If you know any such circumstances, great or small, I desire you to detail them.
A. There are no circumstances.
Q. Was that a fair, clean copy which could be distinctly read or was it blurred as copies are sometimes blurred by too much water on the page?
A. I don't remember.

Q. Did it fill the entire page 988?
61 A. I don't think so.
Q. Was it high up or low down or in the center of the page?
A. I don't remember.
Q. Had you seen it within a year before you delivered the book to Mr. Gillett?
A. Yes, sir.
Q. Had you seen it in less time than a year, before you delivered the book to Mr. Gillett?
A. Within a year is less time than a year isn't it?
Q. When next before you delivered the book to Mr. Gillett had you seen it, that page 988, I mean?
A. I do not understand the question.
Q. How long was it before you delivered the Book "1" to Mr. Gillett that you saw the page 988 in it?
A. I don't know.
Q. Was that page in the book when you delivered the book to Mr. Gillett?
A. I don't know.
Q. Was it in the book when you received the book from Mr. Gillett?
A. I don't know.
Q. Was the word contract and the figures 988 on C page of the index when you delivered the book to Mr. Gillett?
A. I don't know.

Redirect examination by Mr. WARREN:

Q. You have stated on your cross-examination that you do not know whether page 988 was contained in the letter-press copy book at the time you delivered the same to Mr. Gillett, did you deliver said book to Mr. Gillett yourself, if not who did?
62 A. I don't remember who delivered the copy books to Mr. Gillett.
Q. Was or not page 988 in said book at the time when you last examined the same whenever it was?
A. Yes, sir, the page was in there.
Q. You heard the evidence of the plaintiff, Justo R. Armijo, did you not?
A. Yes, sir.
Q. Is it or not true as a matter of fact as testified by him that page 988 was in said book at the time he received the same at the office of Warren, Fergusson and Gillett?

It now being time to adjourn the taking of proofs is adjourned until tomorrow, Friday, May 13th, 1898.

Friday morning, May 13th, 1898, the taking of proofs resumed. Present as before.

Redirect examination of Miss ELOISE ARMIJO resumed:

By Mr. WARREN:

Q. Question repeated.

A. I made no particular search for the page just before the book was handed up but I have every reason to believe that it was there.

Mr. FIELD: I move to strike out the latter part of witness's answer that she had every reason to believe that it was there, as incompetent.

MASTER: Sustained.

Mr. WARREN: Exception.

Q. Upon your cross-examination in response to the question was that page in the book when you delivered the book to Mr. Gillett, your answer was "I don't know." Please explain what you
63 meant by that answer and state what you do know with reference to the fact inquired about.

Mr. FIELD: To which I object because the question assumes that the answer of the witness given on cross-examination was incorrect and assumes that the witness had knowledge upon the point about which she declared upon cross-examination she had no knowledge.

MASTER: Overruled.

Mr. FIELD: Exceptions.

Q. I did not examine the book just before I handed it to Mr. Gillett—just before the book was handed to Mr. Gillett so I cannot state positively whether the page was in there at the time or not.

Q. How long before the time the book was handed to Mr. Gillett had you seen page 988 in that book for the last time?

A. I don't remember.

Q. Can you state approximately from the best of your recollection?

A. No, sir, I cannot.

Q. Can you state that you have seen page 988 of that book in its proper place in the book at any time?

Mr. FIELD: Objected to as leading.

MASTER: Sustained.

Q. Can you state whether or not you had seen the page 988 in question in its proper place in the letter-press book in question at any time before the book was delivered to Mr. Gillett as you just stated?

A. Yes, sir, I saw the page in the book.

Q. Please state approximately as nearly as you remember at what time and how long before the delivery of the book to Mr. Gillett you saw said page in its proper place in that book.

A. I cannot say.

64 Q. Approximately, more or less?
A. No, sir.
Q. Did you see the book when it was returned to your possession by Warren, Fergusson and Gillett?
A. I saw the book but did not examine it closely.
Q. Can you state, Miss Armijo, whether it was a year before Gillett got the book that you saw this page in its place?
A. It was within a year.
Q. But you are unable to state more closely the time?
A. Yes, sir.
Q. When did it first come to your knowledge that the page 988 had been removed from the book in question?
A. In Judge Lee's office when the testimony of Mr. J. R. Armijo was being taken.
Q. You were asked as to whether or not the copy upon that page 988 was a fair, clean copy or whether the same was blurred, and you answered, "I don't remember." I will ask you in that connection if you have had much experience in the matter of copying or taking impressions of papers in letter-press copy books?
A. I haven't had much experience.
Q. Was or was it not the copy upon that page so blurred as in any manner to attract your attention when you saw it?
A. It didn't attract my attention.

Recross-examination by Mr. FIELD:

Q. Have you talked to anybody about this case since your examination was commenced and since the adjournment last night, Miss Armijo?
65 A. Not in detail.
Q. That doesn't quite answer the question; I would like to have an answer yes or no.
A. Yes, sir.
Q. To whom have you talked?
A. I spoke about it at Mr. Harsch's last night.
Q. You talked to nobody else?
A. No, sir; not since last night.
Q. I mean between the time you left here yesterday afternoon and the time you resumed the witness stand this morning and whether or not you talked with anybody about what your testimony had been or what your testimony would be this morning?
A. I spoke to my attorney.
Q. About what your testimony had been and what your testimony would be this morning?
A. Yes, sir.
Q. You did go in person to the office of Warren, Fergusson and Gillett, on the 28th day of April, 1898, and take possession of the impression copy book and did take it home with you and did keep it in your possession until it was produced here at the beginning of this hearing on the 5th day of May, didn't you?

Mr. WARREN: Objected to as not being proper recross.

MASTER: Overruled.
Mr. WARREN: Exception.

A. I went to Warren, Fergusson and Gillett's office for the book and it was left at home I do not remember what length of time.
Q. You took it home from Warren, Fergusson and Gillet-'s office in your own possession, didn't you?
66 A. Yes, sir.
Q. Now will you tell us what you wanted with the book at that time and what you did with it?
A. It was just kept there because I didn't want people to look at my father's and my uncle's private correspondence and my mother's.
Q. You took it away because you were unwilling to trust it to the custody of your own attorney, is that what I am to understand?
A. I didn't distrust my attorneys.
Q. Did you think the book was open to the inspection of people who might read the private correspondence of your father and your uncle in your attorney's office.
A. I understood that Mr. J. R. Armijo was at liberty to take any persons with him to the office to examine the books.
Q. Isn't it a fact, Miss Armijo, that you desired to obtain possession of that book for the purpose of examining it to find out what there was in it that your uncle wanted, and that you did examine it after you took it home for that purpose?
A. No such thing ever occurred to me and I never examined the book after I took it home.
Q. You merely took the book home in order to protect it from the prying eyes of people that your uncle might take to the office of Warren, Fergusson and Gillett and to whom he might expose the private correspondence contained in the book?
A. I took it to avoid the danger of its being done.

Redirect examination by Mr. WARREN:

Q. What attorney of yours do you say you talked with since you were on the stand last evening, and what, if anything, was said
67 in regard to your evidence in this case which had then been given or which you would hereafter give?
A. I talked with Judge Warren, and I spoke about my answer "I don't know" to one of the questions in the last page of yesterday's evidence, I don't remember now the exact question.
Q. State what, if anything, I said to you in regard to what your evidence should be in the case as to the nature of it?
A. I don't remember the exact words you used.
Q. Do you wish it to be understood that I attempted to dictate to you what evidence you should give in the case, except to tell the truth?
A. That was all.
Q. When was that that I spoke to you as you said?
A. This morning.
Q. Please state whether you received any written communication or not from any one which induced you to call for the letter-press

copy book at the law office of Warren, Fergusson and Gillett at the time referred to?

A. I received a typewritten communication, unsigned.

Q. How did you receive it, from what source?

A. I called for it at the post-office.

Q. Where is that communication?

A. This is it.

Q. Please state whether the communication was or not enclosed in the envelope in which the same is now contained at the time you so received it from the post-office?

A. Yes, sir, it was in that envelope.

Mr. WARREN: I offer in evidence the communication with the envelope.

68 (Marked Defendant's Exhibit "8.")

Q. Do you know, Miss Armijo, who was the author of or who sent you this communication through the mail?

A. I haven't the least idea.

Recross-examination by Mr. FIELD:

Q. I understand you to say, Miss Armijo, that you had a conversation with Judge Warren this morning the substance of which was that you called his attention to a particular answer in which you had said, "I don't know," to a question asked you on yesterday, and that he had admonished you that you were to tell the truth in your testimony and that was the substance of what passed between you, is that so?

A. Yes, sir.

Q. You received this communication which is marked Defendant's Exhibit "8" when?

A. I received it on the 27th day of April, 1898.

Q. You took it at once to the office of your attorneys and showed it to them, didn't you?

A. No, sir, I didn't.

Q. When did you show it to them?

A. After I found out that the page had been torn out of the book.

Q. Just when was that that you actually first exhibited that letter Exhibit "8" to your counsel?

A. I don't remember, but I think it was that afternoon.

Q. Why, Miss Armijo, when I asked you this morning why you took that book away did you not mention this anonymous communication?

A. I wasn't asked to mention it I believe.

69 Q. Having received that communication which was mailed on the 26th of April at nine a. m., as appears from the mailing mark on the envelope which you have produced, why did you wait until the 28th day of April to go and demand the book and why did you not exhibit the communication to your counsel at that time?

A. You are mistaken; I demanded the book the 27th, I don't like to talk about or admit that I received anonymous letters.
Q. From whom did you demand the book on the 27th?
A. From Mr. Gillett.
Q. Did he refuse to give it to you?
A. No, sir.

(Signed) ELOISE ARMIJO.

Mrs. BARBARA CHAVEZ DE ARMIJO called and sworn to tell the truth, the whole truth and nothing but the truth, testifies as follows:

Direct examination by Mr. WARREN:

Q. Please state your name?
A. Barbara Chavez de Armijo.
Q. You are the defendant in this case?
A. Yes, sir.
Q. What relationship exists between you and the plaintiff J. R. Armijo, the plaintiff in this suit?
A. He is my brother-in-law.
Q. What was your husband's name?
A. Nicolas Armijo.
Q. Is he living or dead, and if dead at what time did he die?
A. He is dead, he died on December 20th, 1890.
Q. Who acted after his death as administratrix of the estate?
A. I was administratrix.
70 Q. What property or estate, if any, came into your possession or ownership except that which you received from or through your deceased husband, Nicolas Armijo?
A. Only that left by my husband.
Q. Did you as administratrix of that estate or in your own right employ any one as agent to assist in attending to the affairs pertaining to that estate and property, and if so, whom?
A. Yes, sir; I employed Mr. Justo R. Armijo.
Q. The plaintiff here?
A. Yes, sir.
Q. Was that employment verbal or in writing?
A. In writing.
Q. Where is that contract if you know, or what was done with the same when it was executed?
A. It was copied in the copying book.
Q. Do you know what was done with the original paper?
A. I don't know; Mr. Justo R. Armijo may have it.
Q. Will you please look at the copy contained on page 947 of the letter-press copy book in evidence and marked Defendant's Exhibit "1," and state if you can in whose handwriting the body of the same and in whose handwriting the signature of the same respectively are?
A. The body is written by Justo Armijo and the signature is my own.
Q. At what time with reference to the date it bears was the same

actually executed and delivered as between Justo R. Armijo and yourself?

A. It was made in 1891, the same date stamped there.

71 (By consent of parties the official interpreter is directed to translate and make certified copies of all Spanish documents introduced in this case and file the same with the referee and when so translated and filed they are to be treated by the referee as correct unless one party or the other makes objections to the correctness thereof and gives notice to the opposite party of the grounds of his objections.)

Q. Have you seen the original of that paper, copied on page 947, since the same was so written as you have stated by J. R. Armijo and signed by you?

A. I saw the original when it was written and copied.

Q. The question is since, have you seen it since that time?

A. No, sir, I have not seen it since.

Q. In whose possession or who took it at the time you saw it?

A. Justo R. Armijo.

Q. State whether or not you ever had any other written contract with the plaintiff J. R. Armijo in reference to services rendered or to be rendered by him, either as administratrix of the estate of N. T. Armijo or individually than the contract the copy of which appears on page 947 of the book you hold in your hand?

A. No, sir.

Q. For how long a time and up to what period did J. R. Armijo act as agent for you under the contract copied on page 947?

A. I cannot answer that question very readily as the administration ran for two years.

Q. Did you or not employ any one to succeed J. R. Armijo?

A. No, sir.

72 Q. At what time if any, did you receive any final settlement of accounts of J. R. Armijo as agent under the contract in question?

A. I cannot remember the date, the letters show.

Q. Will you please look at this letter now shown you dated January 2nd, 1897, and marked Defendant's Exhibit "2" and state in whose handwriting the same is and at what time and in what manner the same came into your possession and what other written papers if any, were enclosed with the said letter?

A. Final statement of his accounts was enclosed herewith for three thousand dollars, the same as it is here. The letter is written by Justo R. Armijo, is in his handwriting and I received the same on January 2nd, 1897.

(Account, which was heretofore attached to Exhibit "3" as a part thereof is now detached and marked as Defendant's Exhibit "9")

Q. Will you please look at the statement bearing date January 1st, 1897, marked Defendant's Exhibit "9" and state in whose handwriting the same is and when and from whom you received the same?

A. This statement is in the handwriting of Justo R. Armijo and is an account rendered by him and I received the same together with this letter Exhibit "2."

Q. Did anything else accompany the account Exhibit "9" enclosed in the letter Exhibit "2" and if so what?

A. Nothing else,—there was a check included, check for $58.59.

Q. As stated in the letter itself?

A. Yes, sir.

73 Q. What did you do with the said enclosures, the statements and the check referred to?

A. I returned the statement and the check and retained a copy.

Q. How did you return it?

A. By registered letter.

Q. Will you please look at this letter bearing date January 2nd, 1897, and marked Defendant's Exhibit "3" and state in whose handwriting the same is and what you know in regard to the said letter?

A. This is my letter.

Q. What relation had that letter, if any, to the statement and check you have mentioned as having been received from J. R. Armijo by you?

A. By this letter I told him to come to see me to have a settlement.

Q. Was or not anything enclosed in that letter?

A. No, sir; I do not remember whether this letter was together with the statement and the check.

Mr. WARREN: I offer in evidence letter which is marked for identification Defendant's Exhibit "3," and statement which is marked Defendant's Exhibit "9."

Mr. FIELD: Plaintiff objects for the same reason assigned when these papers were offered together as Exhibit "3."

MASTER: They will be admitted.

Mr. FIELD: Exceptions.

Q. Mrs. Armijo, in this statement of account Exhibit "9" there is referred to under date of July 11th, 1892, a note to January 1st, 1897, for six thousand dollars at four per cent. per year with interest computed for four years, five months and twenty days, amounting to one thousand and sixty-six dollars and sixty-six cents, making a total of $7,066.66, will you please look at the note now shown

74 you and marked Defendant's Exhibit "5" and state if you know whether or not the said note is the note referred to in the statement in question?

A. Yes, sir.

Q. In the statement in question under date of December 31st, 1896, appears an item for salary from January 1st, 1892, to January 1st, 1897, amounting to $3,000; please state under what employment or contract of yours with J. R. Armijo the salary so charged during said period was claimed by him to have accrued at that time?

A. I don't know anything about it; we have had no agreement. I do not know.

Q. To whom, Mrs. Armijo, did you return the statement and the check as you have stated?

A. To Justo R. Armijo.

Q. At about what time did you so return it?

A. I am not positive whether I returned it on the same date that the account bears or on the next day.

Q. When for the first time, Mrs. Armijo, did you learn that it was claimed by J. R. Armijo that there had been entered into by and between yourself and him, another and different contract subsequent to the one you have testified about and the copy of which appears on page 947 of the letter-press copy book marked "1."

A. When he relinquished the management of the house January 1st, 1897, I believe I do not remember the date.

Q. Did you learn, Mrs. Armijo, at any time after February 8th, 1891, that J. R. Armijo claimed that you had made another and different contract from that which you made on that date?

75 A. There is no other contract; I requested him to enter into a contract but he always refused.

Q. Will you please look at these two checks now shown you, each dated December 12th and each for the sum of three thousand eight hundred and twenty-four dollars and forty-eight cents ($3,824.48) marked respectively Defendant's Exhibits "6" and "7" and state in whose handwriting signatures to the same respectively are, and in whose handwriting the words upon the back of each said checks, "Collect and credit myself, J. R. Armijo," are?

A. The writing on the back is Justo's writing and the signatures of the checks are my own signatures.

Q. Will you state upon what account and for what consideration each one of these checks was given?

A. One of the checks was given on account of the division of the estate and the other check is on account for future services.

Q. On account of whose future services?

A. On account of future services of Justo R. Armijo for giving attention to the N. T. Armijo building and other business.

Q. State the correct date of these two checks.

A. December 12th, the "90" not marked.

Q. By looking at the bank stamp on each of the checks can you tell the correct date of them?

A. January 19th, 1892; this other one seems to be in 1891.

Mr. WARREN: I offer the stamps, the bank stamps on the face of the checks in evidence.

Mr. FIELD: I make the same objections I made before, when these papers were offered, and the further objection that there is no evidence that the stamps are genuine or as to when or by whom the same were placed upon the checks.

76 MASTER: Overruled.

MASTER: They will be admitted.

Mr. FIELD: Exception to the ruling of the court.

Q. After having delivered these two checks Exhibits "6" and "7" to J. R. Armijo as you have stated state from whom you received these checks which are now in your possession?

A. I got them from the banks.

Q. Do you mean from the banks respectively upon whom they were drawn?

A. One came back to me from the First national bank and the other from the Santa Fé bank.

Q. Do you mean the same banks that they were drawn upon?

A. Yes, sir.

Q. Will you please look at this letter-press copy book marked "1" and state who had the custody and charge of that book since the death of your husband, N. T. Armijo?

A. This book has been in my charge and under the charge of Mr. Justo Armijo until he quit the management.

Q. How frequently prior to the time when this book with other books of account belonging to the estate were deposited at the office of Warren, Fergusson and Gillette for examination by the plaintiff J. R. Armijo, did you examine the book in question?

A. Once and a while whenever I felt like it.

Q. Prior to that time can you state whether page 988 of that book was contained in it or not?

A. Which is that page, the missing page?

Q. Yes.

A. Before that time the page was there, but after the books were taken back to me from the lawyer I put them back in the
77 safe. Before that time I examined the book page by page and the page was there, but after the books were taken back to me from the lawyer I placed them in the safe and did not see them any more.

Q. State whether or not that page 988 was removed by you or with your direction, knowledge or consent?

A. No, sir.

Q. Do you know by whom that page was removed, Mrs. Armijo, from the book?

A. No, sir.

Q. When for the first time did you learn that the page 988 had been removed from the book?

A. On the first day that Mr. Justo Armijo testified I was told so by Eloise, I did not know that said page was missing.

Q. Until then?

A. I then found it out.

Q. Have you any means of knowing what writing had been copied upon that page 988 and if so please state them?

Mr. FIELD: Objected to as cross-examining his witness and leading.

MASTER: Sustained.

Q. Do you know, Mrs. Armijo, what writing had been copied upon that page 988?

A. I don't remember what writing were on the different pages.

Q. What means if any does the book itself afford by which it can be ascertained what writing is copied upon any given page?

Mr. FIELD: Objected to because if the book affords any means the book is the best evidence and the evidence of this witness does not show any special capacity on her part to interpret the book.

78 MASTER: Sustained.

Mr. WARREN: Exception.

Q. Do you know, Mrs. Armijo, what writing has been copied on that page 988?

A. I don't know; I cannot remember page by page; I looked and examined the book before and I cannot tell.

Q. Will you look at the words contract 988 upon page letter C of the index and state if you know in whose handwriting those words and figures are? Begin at the bottom of the page.

A. It is written in pencil; it looked like Justo's, I don't know.

Q. When for the first time did you see those words to which your attention has been called?

A. I had never seen this word before.

Q. How frequently had you examined the book and the index before the book was delivered to Warren, Fergusson and Gillett for examination?

A. I never examined the index; I always examined Justo's letters here, letter by letter, and I didn't look at the index.

Q. Can you state when you have seen that page then 988 before that time?

A. No, sir; I cannot state when nor at what date.

Q. About how long before the book was so delivered for examination?

A. It had been several months, when I became careful about examining the book, it was after Justo left the house and I saw that he was in difficulty.

Q. Can you state whether or not there appeared when you did examine that page 988 there appeared upon it or not the copy of any contract bearing date of June 20th, 1892, and signed by J. R. Armijo and Mrs. N. T. Armijo, and of which Plaintiff's Ex-

79 hibit No. 2 now shown you purports to be a copy?

A. No, sir, this was never here before.

Q. Will you look at page letter G of the index and state if you know in whose handwriting upon the lower written line of that page the words "Gillmore and Company" and the figures "988" respectively are?

A. I cannot state positively whose handwriting that is; they look to me very different.

Q. Do you know in whose handwriting the figures "988" on that page are?

A. I do not.

Q. I will get you to state whether or not at the time you last saw page 988 in that book anything appeared copied thereon, and if so, what?

A. I do not remember.

Q. Were there any blank pages in that book, Mrs. Armijo?

A. When difficulties commenced as I have stated I examined more carefully every page and I did not notice any blank pages.

Q. Did you or not take any steps or means to ascertain what writing had been copied upon the missing page 988 after you say you learned for the first time that that page had been removed from the book?

Mr. FIELD: Objected to because it is immaterial what this witness may have done to ascertain what had been copied on that page, but if any evidence has been obtained as a result of her act, that evidence should be produced.

MASTER: Overruled.

Mr. FIELD: Exception.

A. Yes, sir.

Q. Please state the same and just what was done in regard
80 to it.

Mr. FIELD: Objected to because it calls for hearsay testimony.

MASTER: Overruled.

Mr. FIELD: Exceptions.

A. I tried to obtain information and had some one to write to San Diego and Chihuahua to find out about letters written so as to try and find out what had been placed on that missing page.

Mr. FIELD: I move to strike out the answer of witness because it appears from the answer that what the witness did or claims to have done is wholly immaterial and because the answer contained the witness' construction of letters which she says she caused to be written, while the contents of the letters would be the best evidence if such evidence were admissible at all.

MASTER: Overruled.

Mr. FIELD: Exception.

Q. Will you please look at the paper now shown you marked Defendant's Exhibit "4" for identification and state if the same has been in your possession and how and when and in what manner you obtained the same?

A. This letter came a few days ago registered from Gillmore and Company, San Diego, I do not remember how long since, three, four or five days.

Q. Please look at the envelope now shown you and marked for identification Exhibit "10" and state when and how you received the same if you did so receive it, and whether or not there was enclosed within it the paper Exhibit "4" which you hold in your hand or not?

A. Yes, this is Gillmore's letter; no other letter has come,
81 I mean to say, no other registered letter has come. This letter was received by Eloise.—I received this letter a few days ago but Eloise delivered it to me. Sometimes I am at the door to receive mail and sometimes they are there; Eloise received this

letter and of course she must have receipted for it and I got it from her, from Eloise, and Exhibit "4" was enclosed in it.

Q. State whether or not there was also included in that envelope any letter and if so, please produce the same.

A. Here it is.

Mr. WARREN: I offer letter in evidence.

Mr. FIELD: To the identification of the letter there is no objection, to the introduction of it, plaintiff objects on the ground that there appears to have been a letter written since the taking of testimony in the case was begun to which the plaintiff was not a party the authenticity of which has not been established by proof of the handwriting of the writer and for aught that appears in this case it may have been manufactured by the defendant or under her direction for the purposes of the case.

MASTER: Sustained.

(Letter marked, for identification only, Defendant's Exhibit "11.")

Q. Mrs. Armijo, do you know what the services of J. R. Armijo were reasonably worth in acting for you as your agent during the period he was so engaged up to December 31st, 1896, for each year?

A. That is up to the time he gave up the charge of this house.

A. I don't know what his services were worth, they must have been like the services of all managers.

82 Q. I will ask you whether or not the services were reasonably worth $2,500 a year or not?

Mr. FIELD: Objected to as shown by her answer to the last question that she is not qualified to state the value of the services rendered by the plaintiff.

MASTER: Sustained.

Q. Do you know, Mrs. Armijo, what services were performed by J. R. Armijo for you during these years before December 31st, 1896?

A. He collected my rents, attended to all my business, taxes and all, collected the rents, pay the taxes every year and pay my accounts every year.

Q. Do you know how much of his time was occupied to do that?

A. I do not.

Q. Will you look at this Exhibit No. "9" now shown you and state what reason caused you not to accept the statement rendered by him and what objection there was to that statement?

Mr. FIELD: To which I object unless the reason was communicated to the plaintiff because the reasons if not so communicated are incompetent.

MASTER: Overruled.

Mr. FIELD: Exception.

A. I did not accept it because I considered it to have been paid.

Q. Did you mean to say that you considered him J. R. Armijo to have been fully paid or to say you considered the statement Exhibit "9" to have been fully paid?

A. This was a separate account pertaining to the $6,000 and it

amounted to $7,000 including the interest. I understood it in this way: I loaned him $6,000 (six thousand dollars) at four per cent. after he gave up the management I understood it amounted
83 to seven thousand dollars; the house was indebted to the sum of $4,000; then I had remaining in my favor $3,000. I have nothing more to say about this.

Cross-examination by Mr. FIELD:

Q. You understood at the time Mr. Armijo gave up the charge of the house that he had paid out for you $4,000 more than he had received on your accounts?

A. This $4,000 was paid on account of the house, all expenses and the debt that he owed me was $6,000.

Q. The exact amount was as shown by this statement, $3,717.65?

A. It is necessary for me to compare it with the copy; I cannot remember every number.

Q. Have you the copy?

A. Yes, sir; if it is not so I want that same amount deducted and he will owe me the balance.

Q. You understood that the amount for which the house was indebted as you have stated was $3,717.65 upon which it was claimed that interest has accrued amounting to $290.12 making a total of $4,007.77?

A. I understood it to be $3,000 that he owed me for it can be seen by the reports and the statements which is all I had that showed it, and the accounts due by the house.

Q. Had you any conversation with Justo Armijo immediately prior to the time when you received this statement in which you said to him in substance that his salary was too much?

A. Yes, sir; I told him there was more than he ought to have earned.

84 Q. Did he in that conversation say to you that he was willing to take whatever you were willing to give him or anything of that import?

A. Yes, he always told us that, that there would be no difficulty between us, that he didn't wish any accounts between us.

Q. Did you at that time say to him that you thought six hundred dollars a year from the time the administration closed was enough for him and did he reply, Well, madam, that will just pay my house rent since I have been working for you, but if you think that is all I have earned, I will accept it; and did you then say to him, Brother, you have earned all I agreed to pay you, but the times have been so hard that I am not able to pay it; I thought that I was much richer than I am, and I think you ought to let me off; and did he then say Al- right: now had you such a conversation with Justo Armijo in substance or effect just before that statement was rendered to you?

Mr. WARREN: Objected to as not cross-examination, not proper cross-examination.

MASTER: Overruled.

Mr. WARREN: Exception.

(The witness here stated she was ill and left the room and it being nearly time to adjourn the master adjourns the further taking of proofs until tomorrow morning, Saturday, May 14th, 1898.)

Saturday morning, May 14th, A. D. 1898, the taking of proofs resumed pursuant to adjournment.

Cross-examination of Mrs. N. T. ARMIJO resumed.

By Mr. FIELD:

Q. Will you please answer the question which remained unanswered when you left yesterday afternoon and which the stenographer will read to you?

85 A. No, sir.

Q. You say that you had no such conversation with Justo Armijo?

A. Yes, sir; I state I didn't have such a conversation.

Q. And no conversation of that import?

A. No, sir.

Q. Have you talked with your daughter Eloise about your testimony in this case since you left the witness stand yesterday?

A. About my testimony?

Q. Yes.

A. Yes, sir, we talked about it; she read the testimony to me.

Q. Three times on yesterday while your cross-examination was in progress your daughter approached you and whispered to you did she not?

A. Yes, sir.

Q. She did that twice after she had been told by the referee not to do it, did she not?

A. I did not understand whether she had been told by the referee not to approach me.

Q. She approached you the last time while the question which has been repeated to you was pending and unanswered and after she had whispered to you you declared that you were tired and got up and left the room and went to your home, did you not?

A. Yes, sir, but I was sick.

Q. At the close of your direct examination only a few minutes before your counsel had asked you if you were tired and desired to be excused for the day, and you replied that you were not tired and ready to go on did you not?

86 A. Yes, sir; but I was trying to bear up so as to finish, but I was feeling pretty bad.

Q. And when this last question was asked you, you discovered you couldn't bear up any longer?

A. I could not stand it any longer and I saw the parties present here stand up and I got nervous and stood up myself, and I did not know what I was doing, and I did not know whether I stood up or not.

Q. You testified on your direct examination that all of the services which were performed by Justo Armijo for you were performed

under the agreement which was copied at page 947 of the letter-press copy book "1," did you not?

A. This is as I have already stated up to the time that the partition of the estate was finished.

Q. Now isn't it true, Mrs. Armijo, that all services under that contract, to which I have called your attention, were settled up when on the same day that these two checks Exhibits No. "6" and "7" were signed by you?

A. Yes, sir; but I did not give him this for that matter, check "6" or "7," one or the other for that amount.

Q. Now, as I understand you, Mrs. Armijo, one of these checks, Exhibits 6 and 7, was given to Justo Armijo in satisfaction and payment for all services rendered under the contract Defendant's Exhibit "1," and the other was given to him for services to be rendered hereafter by him.

A. Yes, sir.

Q. One or the other of these checks, and you don't know which, finally settled and closed up the business referred to in the contract Defendant's Exhibit "1"?

A. Yes, sir; it was understood that one of the checks was
87 paid for services up to the final partition of the estate and the house. One is for future services.

Q. Did you take receipts from Justo Armijo at the time you signed these checks?

A. No, sir, the checks were the receipts.

Q. Did you never get a receipt from Justo Armijo on account of this payment?

A. I have no receipt at all.

Q. Did you never have one?

A. I never had a receipt; those are receipts.

Q. Have you not in your possession a receipt signed by Justo R. Armijo in full for his services to you as administrator of the estate of N. T. Armijo, deceased, up to January 1st, 1892?

A. I have no receipt at all.

Q. Was not such a receipt as I have described, given to you by Justo Armijo and some time after the receipt was given, did you not say to him that it was not satisfactory in form and that you desired some additions made to it, and did he not thereupon add to the receipt the words in substance that if there was anything more to be done in the settlement of the estate of Nicolas T. Armijo, he was willing to do it or would do it without further compensation.

A. He always told me the same in the contract as about the receipt that he would do, but he never did it.

Q. Did you not make a final settlement with the probate court prior to December 12th, 1891, of the estate of Nicolas T. Armijo, deceased?

A. I do not remember about the dates, the papers are a great many.

Q. You do remember, do you not, that the estate had been
88 finally settled when you signed these checks?

A. Yes, sir; I remember very well that the administration had been closed, settled.

Q. Is it not true that when Justo Armijo presented one or the other of these checks for your signature, that you directed him to draw a second check for the other half of the fees of administration and that you said to him, that he had done all of the work of the administration and was entitled to all of the fees, that you had done nothing, that he had done it all and that you wanted him to have it all, and did he not draw the second check by your direction?

A. No, sir; that is to say you mean I ceded to him the other half voluntarily to him for having performed the services?

Q. That is the question; didn't you make him a present of the other half under the circumstances detailed in the question?

A. No, sir.

Q. What future services were you paying for with that other check for $3,824.48?

A. So as to attend to all my business and settle them, about the N. T. Armijo building and others.

Q. Was the N. T. Armijo building built at that time?

A. I do not remember, it seems to me the house was not finished yet, but I am not positive.

Q. Had it been begun, the erection of the Armijo building?

A. It seems to me it had, I do not recollect very well.

Q. How long did it take to erect the N. T. Armijo building?

A. I do not remember.

89 Q. When was it completed?

A. The books show all that; I cannot keep all that in my head.

Q. But you are positive that you gave one of these checks Exhibits Six and Seven to Justo Armijo on the 12th day of December, 1891, for services to be thereafter rendered in collecting the rents and looking after the N. T. Armijo building?

A. Yes, sir.

Q. For what length of time was he to attend to collecting the rents and looking after the N. T. Armijo building for this $3,824.48?

A. We had no agreement about the time.

Q. Why was this check which you say you gave him for future services made for $3,824.48, just one-half the administration fees? Why wasn't it four thousand dollars or thirty-five hundred dollars or thirty-eight hundred dollars, or some other even sum of money?

A. I don't know why I did that.

Q. After that and on the 11th day of July, 1892, you loaned Justo Armijo six thousand dollars and took this note, Defendant's Exhibit "5," for it did you not?

A. Yes, sir.

Q. Did he at that time still owe you any part of this $3,824.48, which you say you advanced him on the 12th day of December?

A. He owes it to me up to date.

Q. Why wasn't it included in that note if he owed it to you at the time that note was taken?

A. Because I had given him that money for future services and this is for money loaned, this is another account.

90 Q. You took no writing or other obligation from Justo Armijo when you advanced him this $3,824.48?
A. The amount I gave for future services, is that it?
Q. Yes, sir.
A. No, I have nothing but the checks.
Q. Look at the writing shown you marked Plaintiff's Exhibit "54" for identification and state whether or not, about the first of March, 1892, you received from Justo Armijo a receipt of which that writing is an impression copy?
A. I have never seen that.
Q. If you were notified to produce here at this trial the original of that paper your reply would be, that you had no such original in your possession, would it not?
A. I haven't got it.
Q. And that you have never seen it?
A. I have never seen it.

Mr. WARREN: Question objected to as relating to a matter wholly immaterial and irrelevant to the issues in this case.
MASTER: Overruled.
Mr. WARREN: Exception.

Q. From the first day of January, 1892, until the 31st day of December, 1896, Justo R. Armijo attended to all of your business of every kind and *and* character, did he not, including your business as guardian of your minor children?
A. He attended to everything.
Q. What was your average annual income including the average annual income of your minor children during that period?

Mr. WARREN: Objected to as irrelevant and immaterial.
MASTER: Overruled.
91 Mr. WARREN: Exception.

A. All about incomes, rents, dates and c, can be seen by the books and Mr. Dieckmann can explain that.
Q. Your share of your husband's estate was something more than sixty-five thousand dollars, wasn't it?

Mr. WARREN: Same objection.
MASTER: Same ruling.
Mr. WARREN: Exception.

A. That must be the inheritance I received from my parents and the house of my residence; I don't understand the question.
Q. You received in the partition of your husband's estate the property enumerated on pages 17 and 18 of Exhibit No. "53" did you not?

Mr. WARREN: Same objection.
MASTER: Overruled.
Mr. WARREN: Exception.

A. I have all the property and my children have their share; I

don't understand the question. I had in my power my own property and that of my minor children.

Q. After the settlement of your husband's estate you erected out of your own funds this N. T. Armijo building, at a cost of $85,000, did you not?

Mr. WARREN: Same objection.

MASTER: Overruled.

Mr. WARREN: Exception.

A. I don't know sir, I can't state the amount.

Q. Can you state the average annual income which you have received from this building, gross income, during the period during the time of its completion and the 31st day of December, 1896?

A. I can't tell nothing from memory.

92 Q. You received from Justo Armijo statements each month and at the end of each year, showing your business while under his management did you not?

A. I received monthly statements and also statements of expense each month, that is all.

Q. During that entire period of five years you had no other person to look after your business except Justo R. Armijo and in addition to your business in New Mexico you had property in California and in Chihuahua had you not?

A. Yes, sir, he attended to the business up to the time that he delivered up the house. I have property here and in California, none in Chihuahua.

Q. He paid your household bills, employed your servants and paid them and attended to your business in the minutest detail during the entire period?

Mr. WARREN: It is understood that the same general objection goes to all this class of testimony in regard to *quantum meruit*.

MASTER: That is understood and the same ruling.

A. He paid our servants before he left my house. He paid the assistant there at the house and after he moves to Albuquerque then I paid the servant girls myself.

Q. Now how much have you paid to Justo R. Armijo for the services rendered to you during that period of five years?

A. It is shown there by the notes.

Q. Which notes?

A. One of those, it is to be seen that the money was paid in advance.

Q. If either one of these checks was given for services rendered between January 1st, 1892, and December 31st, 1896, it is

93 quite certain that the payment was made in advance?

Mr. WARREN: ——.

(Question continued.) But will you explain how it is to be seen from either one of these checks that it was given for the reason that you say it was given?

A. I don't understand.

Q. That is to say what is there on either one of these checks from which you claim it will appear that it was in a payment in advance for future services?

A. The check does not show anything at all about that, it was only our understanding about it that it was to be for future services.

Q. Then you do not claim that it can be seen from the checks that one of them was payment in advance?

A. The check does not show anything about that.

Q. You are very positive that you did not enter into a contract with Justo R. Armijo on the 20th day of June, 1892, whereby you agreed to pay him twenty-five hundred dollars a year for looking after your business?

A. There has been no agreement.

Q. Do you know Maximo Griego?

A. Yes, sir.

Q. How long have you known him?

A. He has worked in the house for a long time.

Q. Did you not on the 20th day of June, 1892, in the office at your residence enter into a contract in writing with Justo R. Armijo, such as I have described and was not the contract read to you in the presence of Maximo Griego, by Justo Armijo?

A. No, sir.

94 Q. You are equally positive that there was no agreement of any kind, verbal or written, between you and Justo R. Armijo under which he served you during that period of five years?

A. Yes, sir, I am positive that there was no contract.

Q. I believe you testified upon your direct examination that you had seen page 988 of the letter-press copy book No. "1," do you undertake to say what was on that page when you saw it?

A. No, sir.

Q. Was your name on that page?

A. I do not remember.

Q. You are not willing to say then that when you saw page 988 in that book there was not copied thereon an instrument which had been signed by you?

A. There is no such copy; I looked at the copy book, page after page, in this way (indicating).

Q. And you swear positively that when you last saw that page in this book your name was not on it, that page 988?

A. I don't know what the page contained.

Q. You have just stated in answer to my question that when you last saw page 988 there was not copied on it any instrument signed with your name, you now say that you don't remember, what was on the page, what I desire to get from you is a positive statement, Mrs. Armijo, if you can make a positive statement, whether or not when you last saw page 988 of that book there was a paper copied there purporting to be signed with your name.

Mr. WARREN: I object to this cross-examination the question assumes that the witness has stated a fact which she did not state at all in this cross-examination.

MASTER: Overruled.

95 Mr. WARREN: Save an exception.

A. I stated that I had seen those pages all complete, but I don't know what was precisely upon the same, each page, but I do know there is no contract.

Q. You know there was no contract because you know that you never made a contract, isn't that the reason?

A. I have made no contract.

Q. And for that reason you are willing to swear that there was no contract copied on that page, but you don't remember whether there was any paper copied on that page purporting to be signed in your name or not, do you?

A. I don't know what was contained, the different pages, page after page.

Q. When you last saw page 988 was it copied full, for instance, like page 987 and 989 and 990, or was it less than full?

A. There are a great many less than full.

Q. The question is was page 988 full when you saw it, or not?

A. I do not know; I could not state that.

Q. Did it have only one paper copied on it like page 990, or did it have two papers like page 992?

A. I don't know.

(Recess taken until noon.)

Saturday, May 14th, in the afternoon, now comes parties and by consent of all parties the taking of proofs in this case is continued until Monday morning, May 23rd, 1898.

Monday morning, 10 a. m., May 23rd, 1898, now comes the parties and the taking of proofs is resumed pursuance to adjournment.

96 Examination of Mrs. ARMIJO resumed.

Redirect examination by Judge WARREN:

Q. Mrs. Armijo, did you at any time after December 31st, 1896, say to the plaintiff, Justo R. Armijo, that his salary was too much?

A. I have never talked about salary.

Q. After that date was there any agreement, verbal or written, between yourself and plaintiff, that you were to pay him any fixed salary?

A. There has been no agreement.

Q. You have filed here an account against the plaintiff. Please state whether you have any personal knowledge as to the items of that account, or from what source your knowledge of it is derived.

Mr. FIELD: Objected to as not being redirect examination.

MASTER: Overruled.

Mr. FIELD: Exception.

A. Which is that account?

Q. The account you filed here against Justo.

A. I suppose it is a final settlement he made.

Q. I do not mean the statement rendered you on January 1st, 1897, by the plaintiff, but to your account against the plaintiff filed in this case showing the amounts collected, in the years 1893 for 1894, 1895, 1896 by the plaintiff, together with the principal and interest on his note dated July 11th, 1892, and also showing the amounts disbursed by him for the years mentioned, and showing a balance of $14,000 due from him to you on December 31st, 1896, and a copy of which account is now shown you, and I now ask you if you have any personal knowledge of the items contained in that account, and from what source your knowledge is derived?

Mr. FIELD: Same objection.

97 MASTER: Same ruling, that is defendant asks permission to ask it as an original question on direct examination, which is granted.

Mr. FIELD: Exception.

A. I know that I have seen all these accounts, but I am unable to answer such a long question.

Q. Will you state your age, if you please, Mrs. Armijo?

A. Fifty-three.

Q. Had you—have you any experience as an accountant or bookkeeper?

A. Very little; no, sir.

Q. Up to January 1st, 1897, upon whom did you rely for correctness and honesty of keeping your accounts of your property?

A. Was it the time Mr. Armijo left the estate?

Q. Yes.

A. Mr. Dieckman is the agent keeping these accounts.

Q. My question refers to the period before January 1st, 1897, and before Mr. Dieckman was employed by you.

A. Justo.

Q. At the close of the administration of the N. T. Armijo estate, before January 1st, 1892, did you or not have a full settlement with the plaintiff for his services rendered under his agreement of February 8th, 1891?

A. I have had no other settlement except the settlement of the administration.

Q. Do you know, Mrs. Armijo, how much at that time the plaintiff claimed to be due him for his services up to that time, and how much you paid him in settlement?

Mr. FIELD: Objected to as immaterial.

MASTER: Overruled.

98 Mr. FIELD: Exception.

A. I don't know how much; about eight thousand dollars was the part corresponding to me for my fees, and I paid him one-half of it.

Q. What, if anything, was said between yourself and the plaintiff at the time you delivered to him the two checks, on December 12th, 1891, which are in evidence?

A. I told him that I paid him one-half for the administration and the other for future services.

Q. Please state why you took no receipt from him at that time for these two amounts shown by the checks.

A. Because he did not give me any receipt.

Q. Was there any reason why you did not demand or require any receipt?

A. Yes; I required a receipt from him, but he stated that it was not necessary, many times; that the checks were receipts.

Q. For how long a time, if any was specified, was the plaintiff to collect your rents in consideration of the advanced payment which you say you made him on December 12th, 1891?

A. We did not state any time.

Q. Was or not anything said in regard to the relationship which the plaintiff bore to yourself and your minor children in connection with his undertaking to look after your rents for you?

Mr. FIELD: Objected to as not proper redirect examination.

MASTER: Overruled.

Mr. FIELD: Exceptions.

A. Yes, sir; it was said as we were brothers it was not necessary to keep any accounts or agreements.

99 Q. Will you please look at page 992 of the letter-press copy book marked "1" and state what you know in reference to the time when the letter appearing copied thereon addressed to Messrs. Gillmore and Company, and dated October 27th, 1892, was made upon said page with reference to the time when you delivered said copy book to Warren, Ferguson and Gillett for examination by the plaintiff?

A. I do not remember about this.

Q. Can you state, Mrs. Armijo, about when it was you for the first time saw the copy of the letter to Gillmore and Company upon that page?

A. I have seen the copy there this last few days since this matter has been proceeding, but I do not remember anything before that about it.

Q. Will you please look at the figures 992 upon page letter G of the index and state if you know by whom these figures were made or altered?

Mr. FIELD: Objected to as not cross-examination.

MASTER: Witness may answer.

Mr. FIELD: Exception.

A. I don't know.

Q. Were those figures altered as they now appear by you or with your knowledge or consent?

A. No, sir; I know nothing about these numbers.

Recross-examination by Mr. FIELD:

Q. Since you were last examined here on Saturday, the 14th day of May, you have gone over your testimony with your daughter Eloise several times, have you not?

A. Yes, sir.

Q. Your daughter also told you what questions would be asked you here today, did she not?

A. She has told me nothing.

100 Q. Didn't she have a written memorandum of questions which she read over to you?

A. When?

Q. Since you testified here last.

A. I do not remember.

Q. Was the letter to Gillmore and Company on page 992 of this book there when you delivered the book to Warren, Ferguson and Gillett?

A. I know nothing about it.

Q. When you gave the plaintiff this check for $3,824.48, did you give it to him at his request, or did you proffer it to him for services to be rendered in the future, as you have testified?

A. He told me—I do not know whether it is proper for me to state this or not—he told me that he was buying property, real estate, and that he didn't wish to borrow any money; then I told him that I would help him a little, and that I would give him that half of my fee for future services in advance.

Q. He didn't ask you to do it; you volunteered to do it?

A. Yes; I offered to do that on that account.

Q. He claimed no more from you than what he was entitled to under the contract?

A. No, sir; he did not claim any more, when he settled the accounts, that is about the division of the house.

Q. Now, in the month of July, afterwards, you did lend him six thousand dollars and took his note as you have testified. Was there anything said at that time about the $3,824.48 which you had given him in the December before, as you claimed, for future services?

A. Yes, sir; I told him I would also give him four per cent. in payment for his services so as to keep him satisfied and content.

101 Q. Question repeated.

A. Yes, I told him I would give them to him and that would be more in his favor because I didn't want to make any settlement with him, because you can see that nobody loans money at four per cent.

Q. At the time you loaned this six thousand dollars to the plaintiff, didn't you have a large sum of money on deposit with the bank at four per cent. or less?

A. I had nothing but that, maybe a little more, I do not remember; it wasn't any considerable amount.

Q. This same six thousand dollars which you loaned to the plain-

tiff was at the very time the loan was made, and had been for a considerable time before, loaned to the bank at four per cent., wasn't it?

A. The bank paid something to me, but I do not remember what.

Q. At the time that Justo Armijo notified you that he was going to give up your business you insisted on his keeping it, didn't you?

A. I did not insist.

Q. You were glad to have him give it up?

A. Yes, sir.

Q. He attended to your business to your entire satisfaction, did he not?

A. I do not like to answer that question.

Q. Why?

A. Because I don't know whether I am obliged to answer it. If I am I will answer it.

Q. I think you are.

A. I want to know positively.

Q. Do I understand you decline to answer the question?

A. I have stated I do not like to answer it unless I am bound to answer it according to law.

102 Q. Did you ever make any complaint to Justo Armijo in regard to the manner in which he attended to your business prior to the time he notified you he was going to quit?

A. I do not like to answer that question.

Q. You filed an account here against Justo Armijo in which you claim, or your counsel claims for you, that Justo Armijo owed you fourteen thousand dollars on the 31st day of December, 1896. Who made up that account?

Mr. WARREN: Objected to as immaterial.

A. What account? I want to see it. What account is this?

Q. Do I understand you to say that you know nothing about the account you hold in your hand?

A. There are so many accounts they must be explained by the manager and the lawyer.

Q. Justo Armijo gave you an account every month of the receipts and payments by him, did he not?

A. I received a report and list of expenses; that is all.

Q. Each month?

A. Each month.

Q. Did you ever make any objection to any one of those reports up to the first day of January, 1897?

A. Objection to what?

Q. Objection to accounts, monthly statements which were rendered to you?

A. I told him only that I thought the expenses were rather high, that is all.

That is all.

(Adjourned during the noon hours.)

103 2 p. m.—Taking of proofs resumed pursuant to adjournment.

Q. Mrs. Armijo, have you read your testimony given in this case, and are there any corrections which you desire to make before signing the same? If so, state what they are.

A. I want to know if it has been understood that the final accounts presented me by Justo is for $3,000. This is an entirely different account from that which I paid him for future services.

Mr. WARREN: Attorney for defendant states that the evidence will show for itself what it is, and she is now asked only with reference to any mistakes if there are any in her evidence as it appears typewritten here. (Interpreted to witness.)

A. Yes, that is what I want—that this (pointing to a paper holding in her hand) should be properly understood.

Q. Is there anything else which you desire to call attention to?

A. I granted him free use of an office in payment for services.

Q. For how long a time, Mrs. Armijo?

A. Up to the time he gave up the charge.

Q. Do you mean up to January 1st, 1897?

A. Yes, sir.

Q. What was the use of that office reasonably worth during that period?

A. I don't remember the amount that is charged him for the rooms, but it seems to me it was ten or twelve dollars.

Q. Per month?

A. Per month.

Q. Is there any other matter?

A. No.

104 Cross-examination by Mr. FIELD:

Q. Will you let me see that paper you have in your hand?

A. Yes, sir.

Q. Who made that paper?

A. I did.

Q. When?

A. A few minutes ago.

Q. Where?

A. At my house.

Q. Who was present when it was made?

A. I do not remember.

Mr. FIELD: I ask to have the paper marked for identification.

Paper marked for identification "2."

Q. Was your daughter Eloise present when that paper was made?

A. I do not remember.

Q. Was it part of your agreement with the plaintiff that he was to have an office rent free while he attended to your business?

A. We had no agreement, as I have stated.

Q. Well, when you stated that you granted him free use of an office in payment for his services, you do not mean to say that that

was by virtue of an agreement made with him, but merely that he occupied an office and didn't pay for it during the time he was attending to your business?

A. There was no agreement; that was just it.

That is all.

(Signed) BARBARA CHAVEZ DE ARMIJO.

Miss AURELIA ARMIJO, called as witness, after having been duly sworn, testifies as follows:

Direct examination by Mr. WARREN:

105 Q. Will you please state your name, residence, and what relationship you bear, if any, to the parties to this suit?

A. My name is Aurelia Armijo, I reside in Albuquerque, New Mexico, Mrs. N. T. Armijo is my mother and Justo R. Armijo is my uncle.

Q. Where and with whom have you resided since January 1st, 1892?

A. Albuquerque, New Mexico, with my mother.

Q. Please look at the letter-press copy book now shown you marked "1" for identification, and state how frequently you have seen and examined the same during the period since January 1st, 1892, more or less.

A. I looked at it several times.

Q. At what place was it when you saw it at those times?

A. At our residence.

Q. State what, if anything, you know in regard to said book having been delivered to Warren, Fergusson and Gillett for examination by the plaintiff in this case.

A. I know that the book was delivered.

Q. Can you tell at about what day?

A. I don't remember what date.

Q. Will you please look at pages 987 and 989 in the book and state what you know, if anything, in regard to the missing page 988?

A. I know that when I looked at the book all the pages were in the book.

Q. Including 988?

A. Yes, sir.

Q. You remember when that was with reference to the time the book was delivered to Warren, Fergusson and Gillett as you have stated?

106 A. I looked at the book several months ago.

Q. Did you see that page 988 between June 20th, 1892, and the time of its delivery to the attorneys? If so, can you state how many different writings were copied on that page at such time?

A. I saw all the pages in the book, but I cou-dn't say what was exactly on a page.

Q. Can you state whether or not any writing purporting to be a copy of an agreement signed by J. R. Armijo and Mrs. N. T. Armijo,

dated June 20th, 1892, and of which the pencil copy marked Plaintiff's Exhibit "2" purports to be a copy, appeared copied on that page 988 at any time during the years mentioned when you examined the book in question, as you have stated?

A. I never saw any such contract, and never heard of it until this case was begun.

Q. Had a copy of such contract been contained in book Exhibit "1" at any time during the period I have mentioned would you or not have seen the same?

Mr. FIEDL: Objected to as calling for the opinion of the witness and asking the witness to use the functions of the referee and what weight should be given to her testimony.

MASTER: Objection sustained.

Mr. WARREN: Exception.

Q. Can you state, Miss Armijo, whether page 988 in that book was contained in it or not at the time the book was delivered to the attorneys, as you have stated?

A. I don't know.

Q. Can you state when that page 988 was removed from the book? With reference to the time it was delivered to the lawyers, as you have stated, was it before or after that time?

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A. The first time that I heard the page was out of the book was after Mr. Armijo's testimony was taken.

Q. Can you tell how long before that time it was that you had seen the book and that page 988 was contained in it about, more or less?

A. I saw it four or five months ago. The page was in the book when I saw it.

Q. At that time, can you state whether or not there was more than one writing copied upon that page?

A. There was only one letter on a page—I mean some writing, only one.

Q. Are you able to state what that one writing was?

A. I don't remember.

Q. Are you able to state whether or not that one writing was or was not a copy of an alleged contract?

A. I couldn't say, because I don't remember what the page contained, but I know there was only one writing on it.

Q. Are you able to say whether or not it was this alleged contract; are you not?

A. Yes, sir.

Q. Was it or not?

A. I don't remember any such contract.

Q. Do you mean upon page 988 or any other page of the book? Do you?

A. Yes, sir.

Cross-examination by Mr. FIELD:

Q. Were there any loose pages in this book when you last examined it?

A. No, sir.

108 Q. Are you sure of that?

A. Yes, sir.

Q. You examined the book to see whether or not there were any loose pages?

A. I did not.

Q. But you still say there were none?

A. Yes, sir.

Q. And you are just as positive about that as any other statement you have made?

A. Yes, sir.

Q. When did you last examine the book?

A. Four or five months ago.

Q. Have you not examined the book since this hearing in the master's office was begun?

A. No, I examined it four or five months ago, I said.

Q. You might have examined it four or five months ago and four or five hours ago, and I want to know whether you have examined this book since this hearing was begun?

A. No, sir.

Q. For what special purpose did you examine this book when you examined it four or five months ago?

A. No special purpose.

Q. You examined every page in the book four or five months ago for no special purpose?

A. I don't know what you mean by special purpose.

Q. When you made the examination of the book four or five months ago, what caused you to make the examination?

A. I wanted to read the correspondence in it.

Q. Any special correspondence did you want to read, or all the correspondence of the book?

109 A. All the correspondence.

Q. Did you read all the correspondence in the book?

A. Yes, sir.

Q. How long did it take you?

A. I couldn't say how long.

Q. A week?

A. I don't remember.

Q. Was it as much as a month?

A. I don't remember.

Q. Did you devote your entire time to it during the time you were making this investigation?

A. Pretty near.

Q. And the only purpose you had in making the examination was just to read the correspondence, and you devoted pretty near all of your time to it until you had read page by page everything in this book marked "1" for identification.

A. Yes, sir.
Q. You are positive that there was but one paper on page 988?
A. Yes, sir.
Q. How many papers were copied on page 980?
A. I don't remember.
Q. How many on page 981?
A. I only noticed one writing on each page; that was all I noticed.
Q. If there were any pages in this book containing more than one writing, they escaped your attention?
A. I only saw one on each page.
Q. Who delivered this book to Warren, Fergusson and Gillett?
A. I don't remember.
Q. Did you?
110 A. I don't remember.
Q. To what member of the firm of Warren, Fergusson and Gillett was it delivered?
A. I don't know.

Redirect examination by Mr. WARREN:

Q. Had there been two writings copied on page 988, one of them being the alleged contract, would the fact that there were two writings on that page have escaped your attention?

Mr. FIELD: Objected to as calling for the opinion of the witness; it being for the witness to state the circumstances and the referee as to the probabilities.
MASTER: Witness may answer.
Mr. FIELD: Exception.

A. It would not have escaped my attention.

Recross-examination by Mr. FIELD:

Q. If there were two papers copied on any other page in the book do you think that would have escaped your attention?

Mr. WARREN: Objected to as not being proper cross-examination.
MASTER: Overruled.
Mr. WARREN: Exception.

A. No, sir.
(Signed) AURELIA ARMIJO.

JUAN C. ARMIJO, called as the next witness, and after having been duly sworn to tell the truth, testifies as follows:

Direct examination by Mr. WARREN:

Q. Please state your name, age and relationship to the parties of this suit.
111 A. My name is Juan C. Armijo, 34 years of age next month, and son to Mrs. N. T. Armijo and nephew of J. R. Armijo.
Q. Please look at the paper written in pencil now shown you

narked Plaintiff's Exhibit "2" and purporting to be a copy of an greement dated June 20th, 1892, signed by J. R. Armijo and Mrs. N. T. Armijo, and state whether or not you have ever seen the original of such contract or any letter-press copy or not?

A. I never saw any such contract or copy, either.

Q. Where and with whom have you resided since January 1st, 1892?

A. With Mrs. N. T. Armijo, my mother, First street and West Silver avenue.

Q. When, if at all, did you for the first time hear that it was claimed by the plaintiff in this suit that such contract as the one to which your attention has been called had been executed in writing between those parties?

A. Since this suit started.

Q. Did you or not, Mr. Armijo, at any time see a written contract to the effect of the copy shown you marked Plaintiff's Exhibit "2" among the papers of the plaintiff, J. R. Armijo, in his office, or in the office of Culley and Armijo in the N. T. Armijo building, or in any other place?

A. I never saw any contract anywheres.

Q. Do you mean any contract of which this Plaintiff's Exhibit "2" is a copy?

A. Yes, sir.

Q. Did you at any time have a key to the office of the plaintiff, or of Culley and Armijo, in this building, and did you or not at any time while in possession of such key disturb the papers of the plaintiff in such office, and did you or not at any time remove, destroy or conceal any original contract of any kind or any original contract of which Plaintiff's Exhibit "2" is a copy?

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A. I had a key to Mr. Culley's office; never touched any of his papers or desk or anything pertaining to the office, and I never saw any such contract, much less never touched.

Q. Will you please look at the letter-press copy book now shown you marked Exhibit "1" and state how frequently you have seen and examined the same before this time?

A. I have seen this book and examined it. Have examined a good many letters in it.

Q. Do you know when and by whom page 988 of that book was removed?

A. No, sir.

Q. When for the first time did you learn that page 988 had been taken out of the book?

A. Since this case started.

Q. And from whom did you learn it.

A. I heard my mother speak about it.

Q. You mean since the evidence was commenced to be taken before the referee, Judge Lee, in this case?

A. Yes, sir.

Q. Can you tell about when it was, if at all, you saw page 988 in the book in question?

A. Several months ago.

Q. Can you state whether or not at the time you so saw that page there appeared or not copied upon it any writing which purported to be a copy of this contract, Plaintiff's Exhibit No. "2," or not?

A. I never saw any copy.

Q. Was there or not more than one writing or instrument
113 copied upon that page 988 when you saw it at that time?

A. Not that I remember.

Q. Was there or not more than one instrument or writing copied upon any one page of the book, at any time when you saw the same, before the book was delivered to Warren, Fergusson and Gillett for examination by the plaintiff?

A. I never noticed any; not that I remember.

Q. Do you know the handwriting of the plaintiff, Justo R. Armijo?

A. Yes, sir.

Q. Will you please look at the letter now shown you, dated June 16th, 1892, and marked for identification Defendant's Exhibit "4," and state if you know in whose handwriting the same is, and if so, state.

A. J. R. Armijo's writing.

Q. Can you look at the index page letter G of the letter-press copy book, and if said letter was copied in that book state if you know upon what page of said book said letter was so copied.

Mr. FIELD: Objected to because the witness has shown no qualifications to give expert testimony about that book, because it assumes if there was a letter indexed to Gillmore and Company, the letter shown the witness is that letter, and because the question asks the witness to draw an inference of fact which the referee is much more capable of drawing for himself.

MASTER: Sustained.

Mr. WARREN: Exception.

Mr. WARREN: I will offer in evidence page G of the index of No. "1" and especially the last line on said page.

Page is marked Defendant's Exhibit "12."

114 Mr. WARREN: I offer in evidence letter which has been heretofore marked for identification Defendant's Exhibit "4."

Mr. FIELD: I object upon the same grounds which I made twice before when it was offered, namely: That the letter does not appear to have any connection with this case, it is not shown how it came into the possession of the defendant, and it is not shown to be the letter which is indexed as having been copied on page 988 of the letter-press copy book.

MASTER: It will be admitted.

Mr. FIELD: Exception.

Cross-examination by Mr. FIELD:

Q. You say you had the key to Mr. Culley's office. That was Mr. Armijo's office also, wasn't it, the plaintiff in this case?

A. The desks were together in his office, and I had the key to Mr. Culley's office, the room in front of it.

Q. The key which you had admitted you into the room in which Mr. J. R. Armijo's desk was?

A. Yes, sir.

Q. You had a key to Mr. J. R. Armijo's office in this building from the time he moved his office here, or about that time, until January 2nd, 1897, didn't you?

A. I had a key to Mr. Culley's office until the first week, the first few days, of 1897.

Q. At that time you returned the key, did you not?

A. Yes, sir.

Q. A few days afterwards you applied to Mr. Culley for the key again, did you not?

A. Not that I remember.

115 Q. When you returned your key the first week in January, 1897, you returned that key to the plaintiff, didn't you?

A. No, sir.

Q. You did not?

A. No, sir.

Q. To whom did you return it?

A. To Mr. Culley, the owner.

Q. Did you not, Mr. Armijo, during the month of January, 1897, apply to Mr. George C. B. Culley for a key to the office of Culley and Armijo, and did he not give you the key, and did you not retain that key for five or ten days in your possession and then return it to Mr. Culley?

A. No, sir.

Q. You are entirely positive of that?

Mr. WARREN: Objected to as irrelevant and immaterial.

MASTER: Overruled.

Mr. WARREN: Exception.

A. Yes, sir; I am entirely positive of that.

Q. Now, Mr. Armijo, if you did apply to Mr. Culley some time about the 5th or sixth of January, 1897, for a key to the office of Culley and Armijo, and you did keep that key in your possession from five to ten days and then returned it to Mr. Culley, can you tell what you were doing with it in the meantime?

Mr. WARREN: Objected to as irrelevant and incumbering the record with matter in regard to which the witness cannot be contradicted.

MASTER: Overruled.

Mr. WARREN: Exception.

A. I returned it the first week of January; that is what I said before.

116 Q. And you say now you never had a key to that office subsequent to the first week of January?

A. No, sir.

Q. No, sir, you never had, or no, sir, you never said so?

A. No, sir, I never had.

Q. How many times did you examine the impression book marked "1"?

A. Several times.

Q. When did you last examine the book before it was delivered to Warren, Fergusson and Gillett for inspection by the plaintiff?

A. Several months before.

Q. How many months?

A. Several; about three or four.

Q. For what purpose did you make the examination?

A. Merely to look over my father's letters.

Q. You became bitten with the desire to examine this correspondence about three or four months before this book was taken to Warren and Fergusson, did you?

A. Some time previous to that, too.

Q. Did you examine it page by page and read every letter and contract in it?

A. Nearly so.

Q. Did you devote your entire time to it while you were examining it page by page and reading each letter?

A. No, sir.

Q. How much time did it take to examine this book and all the letters in it?

A. Several months.

Q. What did you find in the book, Mr. Armijo, that now remains in your memory?

A. Letters from my father.

117 Q. You were examining the book merely for the purpose of reading your father's letters, and what you remember about it is that it contained letters from your father?

A. Yes, sir.

Q. Is—did it contain any contract made by your father?

A. No contract.

Q. You are entirely sure of that?

A. Pretty sure.

Redirect examination by Mr. WARREN:

Q. Do you mean to say that you only looked at your father's letters in this copy book?

Mr. FIELD: Objected to as leading and suggestive.

MASTER: Sustained.

Mr. WARREN: Exception.

Q. Did you or not examine all the pages in the book in question, or did you or not only examine copies of your father's letters?

Mr. FIELD: Same objection.

MASTER: Witness may answer.

Mr. FIELD: Exception.

A. Everything in the book.

Recross-examination by Mr. FIELD:

Q. And you say you examined the book page by page and it contains no contracts entered into by your father?

Mr. WARREN: Objected to as not recross-examination, and because it assumes that the witness had answered that the book contained no contract made by the witness's father, when the witness has not so stated.

A. No contract whatever.

118 That is all.

The taking of proofs adjourned until tomorrow morning, Tuesday, May 24th, 1898.

Tuesday, May 24th, 1898.—The taking of proofs resumed pursuant to adjournment.

Present as before.

Mr. ARMIJO recalled.

By Mr. WARREN:

Q. Mr. Armijo, have you examined the copy of the testimony?

A. Yes, sir.

Q. Are there any corrrections you desire to make before signing it, and if so, what?

A. Yes, sir; on page 91. "The key which you had admitted you into the room in which Mr. J. R. Armijo's desk was?" I said "Yes, sir." I want to correct that to "It admitted me if the door between the two rooms was left open."

Q. Did or not the key which you say you had to the outer door of the office of Mr. Culley, or Culley and Armijo, fit the door between that outer office and the office of the plaintiff, J. R. Armijo?

A. I do not know; I never tried it.

WITNESS: On page 93, "Did it contain any contracts made by your father?" I answered "No contracts." My correction: "No contracts that I remember made by my father."

Q. Anything else?

A. Page 94. "And you say you examined this book page by page and it contains no contracts entered into by your father?" I said "No contracts whatever." I want to correct that to "No contracts whatever made by my father."

119 Cross-examination by Mr. FIELD:

Q. In the year 1897, beginning with the 1st of January, do I understand you to say that Mr. Culley and Mr. Armijo had separate offices, and that Mr. Culley had the outer office and Mr. Armijo the inner office? Have you so testified?

A. Yes, sir; different offices.

Q. And you had no key which would admit you to the room in which J. R. Armijo's desk was during the month of January, 1897?

A. I never tried the door.

Q. Did not Mr. Culley's desk and Mr. J. R. Armijo's desk sit together in the same room, and did you not so testify on yesterday?

A. Yes, sir.

Q. Did you ever know the door between these two rooms to be locked?

A. No, sir.

(Signed) JUAN C. ARMIJO.

Mr. OTTO DIECKMANN, called as next witness by defendants, after having been duly sworn, testifies as follows:

Direct examination by Mr. WARREN:

Q. State your name, residence and occupation.

A. Otto Dieckmann, Albuquerque, New Mexico, real-estate and insurance agent.

Q. Are you acquainted with the parties in this suit?

A. I am.

Q. Have you been in the employ of either of them? If so, which, in what capacity and for how long a time?

A. In the employ of Mrs. N. T. Armijo, since January 1st, 1897, as her agent.

120 Q. What experience have you had as a book-keeper and accountant?

A. I was taught book-keeping in Germany, commenced to keep books in 1863 or 1864, and have kept books and accounts ever since.

Q. Will you please look at the books shown to you, that are here present, which were introduced in evidence in this case by the plaintiff, consisting of the journal, ledger, expense book, cash book, ledger of the N. T. Armijo building, the labor account book of the residence, and the partition account book and state if you know in whose possession said books have been since January 1st, 1897?

A. In Mrs. N. T. Armijo's possession and my own, all except this labor book. The labor book has not been in my possession.

Q. Do you know who had kept said books and made the entries therein before that date of January 1st, 1897.

A. Most of the entries are by Mr. J. R. Armijo; a few entries I found in the handwriting of some other person.

Q. Will you look at the monthly statements introduced in evidence by the plaintiff here, marked from Exhibits "3" to "46" inclusive, including annual statements, and state in whose possession they were when you first saw them, and have since been, and in whose handwriting the same are, respectively?

A. The Exhibits 3 to 40 I have seen before in the possession of Mrs. N. T. Armijo, the Exhibits No. 41 to 46, inclusive, I saw the first time in the office of Warren, Fergusson and Gillett about a week ago. All of these exhibits are in the handwriting of Mr. J. R. Armijo.

121 Q. Have you or not, Mr. Dieckmann, carefully examined the several account books and statements which you have referred to, and are you or not familiar with the contents of them?

A. I am thoroughly acquainted with that part of the books relating to the rent collections made from the N. T. Armijo building, and also with the collections made during the years 1893, 1894, 1895, 1896, from other sources. I have also examined those books in regard to the business of the estate of N. T. Armijo, deceased.

Q. Do you know the handwriting of the plaintiff, J. R. Armijo—have you seen him write?

A. I have seen him write and know his handwriting.

Q. Please look at the letter-press copy book marked "1" for identification, and state if you know in whose possession the same has been since January 1st, 1897, and if you know in whose possession the same had previously been after January 1st, 1891.

A. The book, since the 1st of January, 1897, or a few days thereafter, was delivered to me by Mr. J. R. Armijo. I delivered it to Mrs. N. T. Armijo. Previous to that time, as I understand, previous to that time having received it from Mr. Armijo it was in the possession of Mr. J. R. Armijo.

Mr. FIELD: I move to strike out the latter part of the answer of witness, "having received it from J. R. Armijo, etc.," upon the ground that it is an inference of fact drawn by the witness, and not a matter within his knowledge as appears by his answer.

MASTER: It will be stricken out; just give the facts as you know them, and not your conclusions.

Q. Please state what you know, of your own knowledge, Mr. Dieckmann, as to whose possession the book had been in before January 1st, 1897.

122 A. I stated that I received it from Mr. J. R. Armijo, and from that part I inferred it was in his possession.

Mr. FIELD: I ask the master to strike out his inference.

MASTER: It is stricken out.

Q. At what date did you receive the said book from the plaintiff?

A. In the beginning of January, 1897; I do not remember the day.

Q. Did you see said copy book, as well as the other account books in evidence, in the latter part of April of this year, or the early part of May; if so, where?

A. I did not see them.

Q. Can you state at what time you saw the copy book No. "1" before the beginning of the testimony before the referee in this case, which was May 5th, of this year?

A. I had the copy book in my possession during January and part of February, 1897, at my office. I have seen it often since that time in the office of Mrs. N. T. Armijo.

Q. Up to what date?

A. Up to May 5th, or the beginning of May, 1898.

Q. Please state definitely what book you refer to.

A. This copy book marked for identification "1."

Q. Please state if you have thoroughly examined said book?

Mr. FIELD: Objected to as leading.

Mr. WARREN: I hadn't finished the question.

Q. Please state if you have thoroughly examined said book or not

Mr. FIELD: Objected to as leading.
123 MASTER: Witness may answer.
Mr. FIELD: Exception.

A. I have.

Q. Please state what pages, if any, of said copy book are missing or were missing therefrom at the time you last examined said book, giving the date of such examination by you.

A. When I examined the book in January and February, 1897, I examined that part of the book in which copies of letters and other instruments of writing written by Mr. J. R. Armijo were made. I found none of those pages missing.

Q. Please refer to the book and state what pages you refer to as having been examined by you at that time?

A. Beginning with page 944 and ending with page 995.

Q. Will you please state whether page 988 is now contained in that book?

A. It is not.

Q. Please state whether or not you saw said page 988 while contained in the book, and if so, at what period of time you saw said page in the book?

A. I saw page 988 in the book while I was examining the book in January and February, 1897.

Q. Do you remember the latest time at which you saw that page in that book?

A. In February, 1897.

Q. Do you know when or by whom that page 988 was removed from that book?

A. I do not.

Q. When for the first time did you learn that page 988 had been taken out of the book?

A. At the beginning of this examination. In this office here.
124 Q. And from whom did you learn it—from whose statements?

A. From J. R. Armijo.

Q. Do you know what was contained on page 988 of the book in question?

A. I do.

Q. State what was so contained on that page at the time you last saw the same in the book.

A. A letter to Gillmore and Company, San Diego, California.

Q. Please state whether or not at the time you last saw said page there was or not anything else copied upon it other than the letter to Gillmore and Company which you have mentioned?

A. There was only this letter to Gillmore and Company.

Q. Please look at the letter now shown you marked Defendant's Exhibit "4" and state if you know in whose handwriting the same is, and what you know in regard to the said letter?

A. In the handwriting of Mr. J. R. Armijo.

Q. When and where, Mr. Dieckmann, did you first see the letter, Defendant's Exhibit "4"?

A. In the office of Warren, Fergusson and Gillett. I don't remember the date. About a week ago, I think.

Q. In whose possession was it at that time?

A. Miss Eloise Armijo handed it to me.

Q. At that time was it contained in any enclosure or envelope or not?

A. It was in a registered envelope.

Q. Please look at the envelope marked Defendant's Exhibit "10" and state what you know in regard to it?

A. That was the envelope containing the letter.

125 Q. What do you know, Mr. Dieckmann, as to whether or not Defendant's Exhibit "4" was the original of the press copy which was contained on page 988 of the copy book in question? Please state what you know in regard to it.

A. I could not say that is the original of the copy. I wired to Gillmore and Company if they had in their possession a letter written by Mr. J. R. Armijo, as agent of Mrs. N. T. Armijo, between the dates previous to the letter appearing on this copy book, that is previous to the dates which page 988 is torn out and the letter which appears in this copy book after this page 988.

Mr. FIELD: I move to strike out the answer of the witness on the ground that it states the contents of a written instrument, to wit, a telegram, of which the telegram itself would be the best evidence, and because it states an immaterial matter that passed between the witness and Gillmore and Company in the absence of the plaintiff.

Mr. WARREN: To which the defendant replies that he states professionally that he intends to follow up this evidence by the production and proof of the original telegram in question to prove the contents thereof, and that the question answered by the witness is only preliminary, and that the only purpose to be accomplished by striking out the answer of the witness is to cause annoyance, delay and expense.

Mr. FIELD: To which the plaintiff replies that it appears that any attempt on the part of the plaintiff to insist upon the rules of evidence in this case causes annoyance, delay and expense to the defendant.

MASTER: I will wait until you produce the other testimony before ruling upon it.

126 Q. Please state what caused you to telegraph to Gillmore and Company as you did.

Mr. FIELD: Objected to upon the ground that the witness's motive in sending the telegram, if he did send one, are wholly irrelevant and cannot affect the rights of the parties.

Mr. WARREN: To which defendant's attorney replies that he expects to show in answer to this question that the index of the copy book in question shows that page 988 of the book had contained a

letter to Gillmore and Company, which is a fact and not a motive, as characterized by the attorney for the plaintiff, and the question is so asked to avoid the objection of asking a leading question of the witness.

Mr. FIELD: To which the counsel for plaintiff replies that he is not aware of any rules of evidence which permits the deductions of a witness from facts proved in the case to be given in evidence under the guise of so-called facts; the fact of what the evidence shows is already before the master, and the master is more able to draw inferences from facts proven than the witness.

MASTER: Sustained.

Mr. WARREN: Exception.

Q. Please look at page letter G of the index of the copy book and state if you can in whose handwriting the last line upon said page is.

A. In the handwriting of Mr. J. R. Armijo.

Q. The figures 988 upon that line, in whose handwriting are those?

A. In the handwriting of Mr. J. R. Armijo.

Q. Do the figures 988 occur upon any other page of the index to the book in question?

A. They also appear on page C of the index.

Q. Upon what line of that page and in whose handwriting?

127 A. Upon the last written line on the page, in the handwriting of Mr. J. R. Armijo.

Q. From your knowledge and experience in the matter of handwriting done with a lead pencil, what, if anything, can you state as to the date when the words and figures "contract 988" upon that page were made with reference to the time—reference to the dates when the other entries on that page were made?

Mr. FIELD: Objected to for the reason that this witness has not been shown to be an expert in handwriting, or to have any particular knowledge of lead-pencil writing, and no foundation had been laid for the question.

Sustained by master.

Mr. WARREN: Exception.

Q. Mr. Dieckmann, will you please state what experience you have had, and for what length of time, and what the character of that experience has been in the matter of handwriting with a lead pencil, as well as with pen and ink, and whether or not that experience has been such as to enable you to form an opinion as an expert with reference to dates or periods of time at which different writings in pencil were made.

A. I do not care to testify as an expert to this writing, whether these two entries were made at the same time or at different times. I can testify, though, that this word "contract 988"——

Mr. FIELD: Objected to, as — the word "contract 988" as not responsive.

Q. Mr. Dieckmann, you haven't answered the first part of the question as to the extent of your experience, etc.

128 A. I could not testify to the age of lead-pencil writing.

Q. That doesn't answer the question, either.

Q. Are there different rules applicable to lead-pencil writing different to pen and ink?

Mr. FIELD: Objected to as this witness has foreclosed further inquiry by counsel on this question.

MASTER: I will let witness answer.

Mr. FIELD: Exception.

A. If the same kind of pencil were used all the time you would be in a position to judge. A soft lead pencil or a hard lead pencil would make different writing, and I would not undertake to testify to any lead-pencil writing in this case in the sense that has been asked.

Q. In whose handwriting are all the preceding entries on that page letter C of the index, if you know?

A. Not in the handwriting of Mr. J. R. Armijo.

Mr. FIELD: Move to strike out the answer of the witness as not responsive to the question.

MASTER: Sustained.

Mr. WARREN: Exception, on the ground that the defendant, who asks the question, raises no objection to the fact that the answer is not responsive to the question.

Q. Can you state whether or not the entries upon the page letter C in question are or are not in the handwriting of the plaintiff, J. R. Armijo, preceding the last line?

A. They are not in the handwriting of Mr. J. R. Armijo.

Q. Can you state whether or not the words and figures, "contract 988," upon the page letter C of the index in question were written as they now appear at the time you examined the book No.

129 "1" at the times you have mentioned?

A. They were not.

Q. State whether or not more than one instrument or writing was copied upon any one page of the letter-press copy book in question between pages 944 and page 995, inclusive, at the times you examined said book as you have stated.

A. There was only one copy to each page.

Q. Will you please look at page 992 of the book in question and state if you know whether or not the copy appearing upon that page, purporting to be of a letter dated October 27th, 1892, addressed to Messrs. Gillmore and Company, San Diego, California, and signed by J. R. Armijo, appeared upon said page at the time you examined said book as you have stated?

A. It was not there.

Q. Can you state, Mr. Dieckmann, what would be a reasonable compensation for the collection and disbursements of the rents of the N. T. Armijo building during the years 1893, 1894, 1895, 1896, or what rate?

A. Five per cent. on all money collected.

Q. Will you refer to the books of account in evidence here and

state upon what pages of said books appear the amounts collected and disbursed by the plaintiff during those years?

A. In the cash book kept by Mr. J. R. Armijo, beginning March 1st, 1893, pages 1 to 42, inclusive, of book numbered Plaintiff's Exhibit "50."

Q. You have stated, Mr. Dieckmann, that you first saw Plaintiff's Exhibits Nos. 41 to 46 about a week ago. Please state when and where you saw the preceding exhibits numbered from 3 to 40, inclusive and in whose possession.

130 A. I saw them in January, 1897, in the possession of Mrs. N. T. Armijo.

Q. Please look at the letter book marked "1" at page 947 and state if you know in whose handwriting the body of the writing and the signature thereto, respectively, are?

A. The body is in the handwriting of Mr. J. R. Armijo, the signature in the handwriting of Mrs. N. T. Armijo, and signs herself as Barbara Chavez de Armijo.

Mr. WARREN: I offer letter which is marked for identification Defendant's Exhibit "11."

Mr. FIELD: Objected to, no foundation having been laid for its introduction. Its genuineness is not established, and if a genuine letter it is not admissible to affect the rights of plaintiff.

Mr. WARREN: Offer is withdrawn at this time.

Cross-examination by Mr. FIELD:

Q. When was it, where was it, and who was present when Justo R. Armijo delivered to you the letter-press copy book marked "1"?

A. Beginning of January, 1897, in the office of J. R. Armijo. Mr. J. R. Armijo was present.

The taking of proofs is now adjourned until tomorrow morning at ten o'clock, Wednesday, May 25th, 1898.

Wednesday morning, May 25th.—The taking of proofs resumed pursuant to adjournment.

Present as before.

Cross-examination of Mr. OTTO DIECKMANN resumed by Mr. FIELD:

Q. Do I understand that you are unable to fix the day in January, 1897, when this letter-press copy book was delivered to

131 you by J. R. Armijo, and that there was nobody present but yourself and J. R. Armijo?

A. I cannot fix the date. I did not notice anybody but Mr. J. R. Armijo.

Q. Did Mr. J. R. Armijo deliver to you books in connection with this business more than once in January, 1897?

A. He did.

Q. How many times?

A. I understood your question to be, Did he deliver more than one book? That is a mistake. He only delivered them once.

Q. How many books did he deliver at that time, and what are they?

A. A ledger, a journal, a cash book and a copy book.

Q. Four books only?

A. Four books.

Q. The cash book you have heretofore referred to, and is Exhibit No. "50," is it not?

A. Yes, sir.

Q. The ledger is Exhibit No. "51"?

A. No, sir.

Q. Exhibit No. "51" was not delivered to you by J. R. Armijo?

A. No, sir.

Q. Was it the ledger Exhibit No. "48" which was delivered to you?

A. Yes, sir.

Q. The journal Exhibit No. "47"?

A. Yes, sir.

Q. And the copy book marked "1"?

A. Yes, sir.

Q. Exhibits Nos. "49," "53," "52" and 51" were never delivered to you by J. R. Armijo, do I so understand you?

132 A. No, sir, they were not delivered to me by J. R. Armijo.

Q. What time of day was it when these books were delivered to you—was it in the morning or afternoon?

Mr. WARREN: Objected to as immaterial.

MASTER: Overruled.

Mr. WARREN: Exception.

A. In the afternoon.

Q. You carried the books directly to your office, did you?

A. I did, sir.

Q. And you kept them in your possession during the remainder of the month of January and a part of February?

A. I did not.

Q. Didn't you so testify on your direct examination?

A. I testified that I had those books in my office part of January and part of February, 1897.

Q. Did you testify upon your direct examination that you had the press copy book in your possession from the time it was delivered to you by J. R. Armijo until some time in February, when you turned it over to Mrs. N. T. Armijo?

A. I did not. I testified that I had those books in my office part of January and part of February, 1897.

Q. Then you did not have the books continuously in your possession from the time they were delivered to you early in January, 1897?

A. Not continuously.

Q. How long did you have them in your possession?

133 A. When I received the books from J. R. Armijo I kept them in the office for about a week, then had them taken over to Mrs. N. T. Armijo's residence, where I explained to Mrs. Armijo——

Mr. FIELD: I didn't ask you for any explanation at all that you made.

Question repeated.

A. After I received the books of J. R. Armijo I had them in my possession for about a week.

Q. Is that all the time you had those books in your possession—one week?

A. I had them about five weeks longer after that.

Q. When was this you had them five weeks longer after that?

A. Part of January and part of February, 1897.

Q. What part of January and what part of February?

A. The latter part of January and most all of February, 1897.

Q. How long did they remain at the house of Mrs. N. T. Armijo, if you know, in the month of January, 1897?

A. About a week or ten days.

Q. What was being done with them at that time, if you know of your own knowledge?

A. They were explained by me to Mrs. Armijo.

Q. Was anybody present during your explanation?

A. Yes.

Q. Who?

A. Miss Armijo.

Q. That's all?

A. Mr. Sleyster.

Q. Then Mr. Sleyster did see this book in Mrs. Armijo's house in the month of January, 1897, didn't he?

134 A. I don't know whether he looked at the copy book.

Q. It was there when he was there, wasn't it?

A. It was in Mrs. Armijo's house; yes, sir.

Q. When was it that you examined this letter-press copy book for the purpose of ascertaining whether or not all the pages were in it, and who was present when you made the examination?

A. In January and February, 1897. Nobody was present.

Q. How many examinations did you make?

A. A good many. I don't know how many.

Q. Did you examine the book every day you had it?

A. Not every day.

Q. Every other day?

A. Not every other day.

Q. Twice a week?

A. Maybe.

Q. Did you examine it twice a week?

A. Maybe.

Q. I am not asking you for what may be, Mr. Dieckmann. You are under oath and sworn to tell what you know of your personal nowledge.

A. I don't remember.

Q. Can you tell whether you examined that book one time or twenty times while it was in your office?

A. I can state that I at least went five times through the book.

Q. What were you looking for?

A. I was looking over all the correspondence of J. R. Armijo, and I was particularly looking over the correspondence to Gillmore and Company. I examined every page. I examined the number of the pages.

135 Q. And you examined every page at least five times?

A. I went through the book at least five times.

Q. Now can you tell what there was in this book between page 944 and page 995 that would make it necessary for you to make more than one examination of it to thoroughly understand and digest all that was in it?

Mr. WARREN: Objected to as constituting part of counsel's proposed argument and not examination of witness.

MASTER: Overruled.

Mr. WARREN: Exception.

A. I made these examinations for a certain purpose.

Q. What was the purpose?

A. On examining the ledger and journal I found irregularities and forced entries, and I concluded to make a thorough examination of everything. I not only examined the pages in the copy book. I also examined every page in the journal and the ledger. I done this because I have been taught to do so. I have done in other cases so under instructions.

Q. That is the explanation you have to make of your statement that you made at least five examinations of every page of this letter-press copy book during the months of January and February, 1897?

A. That is.

Q. How many letters contained in this copy book between pages 944 and 995 refer even remotely to any accounts or any entry in any other book?

Mr. WARREN: Objected to as being matter of argument for counsel rather than matter for cross-examination of witness.

MASTER: Overruled.

Mr. WARREN: Exception.

136 A. Some letters to Gillmore and Company; some letters to a bank in Old Mexico.

Q. What contract have you, Mr. Dieckmann, with the defendant in this case for your services in making this examination about which you have testified?

A. None whatever.

Q. You made this examination without any contract and without any hope or expectation of compensation?

A. I did.

Q. You have taken a very active interest in this case, haven't you?

A. I generally take interest in the interests of my employers.

Q. Your interest in this case is in the line of your employment of the defendant, as you understand it?

A. Yes.

Q. Then you are not doing it without compensation?

—. ——.

(Question continued.) You are getting paid for what you do for defendants, ain't you? Or do you work for her entirely without compensation?

A. Under my contract with Mrs. Armijo I get five per cent. on rent collected. I don't get any compensation for this work.

Q. Did you ever call the attention of any person to page 988 of this book when it was in the book?

A. I did not; I had no occasion.

Q. You say that the letter at the bottom of page 992 was also not in the book when you made the examination?

A. It was not.

137 Q. Are you able to remember distinctly that this particular copy was not upon this particular page when you examined this book in 1897, or do you remember that there was not more than one paper copied upon any one page?

A. I remember distinctly that it was not on that page.

Q. Do you remember what was on the page?

A. No, sir.

Q. You have examined the book within the last twenty-four hours, haven't you?

A. I have.

Q. And you can't tell now what was on the page when you last examined it?

A. I did not examine that page.

Q. You examined the index, of course, when you made your examination in 1897?

A. I did.

Q. For what purpose?

A. To find certain letters and contracts.

Q. Although you were making an examination, page by page, and made that examination at least five times, you yet had to examine the index to find certain letters and contracts?

A. I found that the index was not correctly kept.

Q. Now, will you kindly point out what errors you discovered in your examination in January and February, 1897, in the index?

A. I was looking in the index for contracts or agreements made by Barbara Chavez de Armijo on page 947. I could not find anything in the index. I was looking in the index for power of attorney or something of that kind on page 948, made by Barbara Chavez de Armijo, and I could not find it in the index.

138 Q. Did you first find these instruments to which you refer in the book and then look in the index for them, or, failing to find them, look through the book for them?

A. I first looked at the index; not finding them in the index I went through the book page by page.

Q. Under what head in the index did you look for them?
A. Under A and C.
Q. You didn't look in any other page for them?
A. I don't remember whether just at that time I looked on any other page in the index for them. I went through the index.
Q. Did you go through the index before you went through the book, or did you go through the book before you went through the index?
A. I went through the index first.
Q. Pretty near as much of the index to go through as there is of the book you went through, isn't there?

Mr. WARREN: Objected to as immaterial.
MASTER: Overruled.
Mr. WARREN: Exception.

A. Hardly.
Q. You are just as positive that the letter to Gillmore and Company, dated October 27th, 1892, did not appear on page 992 when you made the examination in 1887 as you are that there was no contract between plaintiff and defendant copied on page 988, are you?
A. I am.

Redirect examination by Mr. WARREN:

Q. Why is it that you examined the pages in the copy book after page 944 at least five times during January and February, 1897, as you have stated upon your cross-examination?
139 A. I found irregularities and what I call forced entries in the journal and the ledger.
Q. Will you please look at the irregularities or forced entries which you referred to and point them out to the referee?

Mr. FIELD: Objected to as not cross-examination.
MASTER: Sustained.
Mr. WARREN: Exception.

Q. You stated, Mr. Dieckmann, that you did not call the attention of any one to the contents of page 988 of the copy book. Will you state what reason, if any, existed for your calling attention to that page more than to any other particular page of that book?

Mr. FIELD: Objected to as an argumentative question and calling for the motive and inferences of the witness and his opinion.
MASTER: Overruled.
Mr. FIELD: Exception.

A. I had no cause to call anybody's attention to it.
That is all.
(Signed) OTTO DIECKMANN.

Mr. L. T. DELANEY, being first duly sworn, takes the stand as a witness on behalf of defendant.

By Mr. WARREN:

Q. Will you state your name and occupation?

A. My name is L. T. Delaney, manager of Western Union Telegraph office, Albuquerque, New Mexico.

Q. Have you in your possession, or with you, any telegram received by you in that capacity dated May 5th, 1898, addressed to Messrs. Gillmore and Company, San Diego, and signed Mrs. N. T. Armijo, and if so will you please produce the same?

140 A. I have.

Witness produces telegram which is marked for identification Defendant's Exhibit "13."

Q. From whom did you receive that message?

A. Otto Dieckmann.

Q. At what time, with reference to its date, did you receive it, and what did you do in relation to it?

A. The telegram was handed to me by Mr. Otto Dieckmann on May 5th, the time of day is shown in the message. I transmitted it as soon thereafter as possible.

Q. You transmitted it by what means?

A. By telegraph to Los Angeles, the regular relay office for San Diego.

Mr. WARREN: I offer this in evidence.

Mr. FIELD: I object upon the ground first that this telegram is not shown to have been received by Gillmore and Company, second upon the ground that the contents of this telegram are wholly immaterial in this case and cannot affect the right of the plaintiff.

MASTER: It may go in.

Telegram is marked Defendant's Exhibit "13."

Mr. FIELD: Save an exception.

Q. State whether or not you have in your possession any message purporting to be an answer of this telegram.

A. I have such a message.

Q. Please produce it and let it be identified.

Answer marked for identification Defendant's Exhibit "14."

Q. When and in what manner was the message, a copy of which is produced, received by you?

A. Fourteen minutes after 4 o'clock in the afternoon, by telegraph, May 5th, 1898.

141 Mr. WARREN: I offer it in evidence.

Mr. FIELD: I make the same objection as I made to the other telegram, that there is no evidence that this telegram was sent by Gillmore and Company, or that it is an answer to the other telegram.

MASTER: It will be admitted.

Answer marked Defendant's Exhibit "14."

Q. To whom was this message, when received, delivered, Mr. Delaney, if you know?

A. I am not positive, but I think the telegram was delivered to Mr. Otto Dieckmann. I have not the delivery sheet with me.

Q. Can you look at the delivery book and in that manner refresh your memory as to who this message was delivered?

A. Yes, sir.

Q. Please do so.

A. The telegram is receipted for by Mr. Otto Dieckmann, 22 minutes past four o'clock, the same day.

Cross-examination by Mr. FIELD:

Q. Do I understand you to say you delivered that paper to Mr. Otto Dieckmann 22 minutes after four o'clock on the same day? (Referring to Defendant's Exhibit "14.")

A. I mean to say that this is a press copy of the telegram I delivered Mr. Dieckmann, not that I delivered this paper at all.

(Signed) L. T. DELANEY.

FRANK MCKEE, being called and sworn as a witness for defendants, testifies as follows:

Direct examination by Mr. WARREN:

Q. What is your name, residence and occupation?

142 A. Frank McKee, Albuquerque, New Mexico. I am assistant cashier First national bank, Albuquerque, New Mexico.

Q. Please state the nature and extent of your experience in the observation and comparison of the handwriting of men, and how long in the course of your business you have been called upon to observe the characteristics in the handwriting of different men, and in the handwriting of the same men at different periods of time?

A. I have about eight years' experience in regard to signatures of men; nothing as to the general handwriting except as to the signature.

Q. You mean signatures written with pen and ink?

A. Yes, sir; signatures on checks and drafts.

Q. Are you able, from your experience in the observation of writings, to form an opinion by comparison of handwriting known or admitted to be made by the same person as to whether said writings were made by such person at or about the same period of time, or whether an interval of greater or less time had elapsed between the times at which such writings were made?

A. No, sir.

Q. Have you or not observed that in the course of years the handwriting of any person is liable to be changed, while at the same time retaining its general characteristics, so that it can be identified?

A. Yes, sir; I have.

Q. Can you or not, then, from your experience form an opinion

by comparison of handwriting of the same individual, whether or not such difference—any difference which may appear in such writings—was or was not the result of a passage of an interval of
143 time between the dates at which such respective writings were executed, where such writings were executed with ordinary writing fluid?

A. No, sir.

Q. You would not be able to form any opinion by comparison?

A. No, sir.

Signature waived.

Mr. WARREN: The defendant moves that the further taking of evidence on the part of the defendant be continued for the period—or rather be postponed for the period of two weeks from this date, in order to procure testimony of one Jesse Gillmore, a resident of San Diego, California, and whose testimony defendant alleges to be material and necessary in said cause, and in support of said motion files with the referee her affidavit setting forth the grounds of said motion.

Mr. FIELD: Plaintiff objects to the sufficiency of the application for the following reasons: First, because it appears that the testimony sought to be elicited from the witness is as to a purely collateral matter; second, because the affidavit fails to state that the evidence sought to be elicited from the witness is true to the knowledge of the affiant; third, because the affidavit discloses the fact to be that on the 5th day of May the defendant had notice of the necessity for this testimony, if it be necessary at all, and a sufficient time has elapsed since the defendant had such notice to have enabled her to take this deposition and have it returned according to her own showing, and therefore the affidavit fails to show any diligence.

MASTER: I will grant a postponement of defendant for two
144 weeks to put in his testimony without at this time passing upon the admissability of the proposed evidence.

The taking of proofs is now adjourned until tomorrow, Thursday, May 26th, A. D. 1898.

Thursday, May 26th, 1898.—Now come the parties and the taking of proofs is adjourned for two weeks, as defendant states he is unable to get a witness.

Thursday, June 9th, 1898.—The taking of testimony having been adjourned unto this day, and the parties not being present, the taking of proofs is adjourned until Monday, June 13th, 1898.

Monday, June 13th, 1898.—Taking of proofs resumed pursuant to adjournment.

Present as before.

Defendant here closes case, reserving the right to introduce deposition taken in California of Jesse Gillmore when same is filed in the clerk's office, and the plaintiff reserves the right to interpose all legal objections to the said deposition when offered.

Plaintiff in rebuttal calls FRANCISCO A. MANZANARES, who, being duly sworn, testifies as follows:

Direct examination by Mr. FIELD:

Q. State your name, residence and occupation.
A. Francisco A. Manzanares, Las Vegas, New Mexico. I am a merchant.
Q. Are you acquainted with the parties to this suit, and if so, for how long have you known them?
A. Yes, sir; I am. I have known them for a great many years. I don't remember just how long—over twenty years, I know.
Q. State whether or not you were consulted by defendant
145 with reference to matters in controversy in this suit in the year 1897.
A. I was called on by Mrs. N. T. Armijo for advice.
Q. When was that?
A. I don't remember. It was last year. It was before the beginning of this suit, I think. At least I don't know anything about it.
Q. The suit was brought February 13th, 1897. Was it before or after that?
A. It was before and after that date, at least.
Q. State, Mr. Manzanares, whether or not at the time of any conference between you and the defendant you saw in her possession an original receipt, an impression copy of which is marked for identification Plaintiff's Exhibit "54," which I now show you.
A. I have been trying to refresh my memory for some days, since I knew of this case, but I couldn't positively swear that I saw the original of this of which this is a copy.

Mr. WARREN: Defendant objects, as wholly irrelevant and immaterial, as defendant admits the execution of the receipt in question by the plaintiff.
MASTER: Go on with your answer, Mr. Manzanares.
Mr. WARREN: Exceptions.

A. I was shown a large number of papers and books by Mrs. Armijo, and it is possible that this is one of them, but I can't positively state in my mind.
Q. Is that all you can say about that at this time, Mr. Manzanares?
A. I think so, Mr. Field.
Q. Can't you say whether or not you saw a receipt of similar import to that copy?

Mr. WARREN: Objected to as leading and suggestive.
MASTER: Overruled.

146 A. I do not distinctly remember that I saw just such a document as that, and I do not remember that I didn't see it. I didn't fix the particular document in my mind at the time so as to be able to remember it in the future.
Q. Mr. Manzanares, having seen that copy, please state your pres-

ent recollection, your best recollection, as to whether or not you saw the original of it in Mrs. Armijo's possession.

A. After seeing that copy I had some rather indistinct recollection that some such document may have been in the papers which I was shown by Mrs. Armijo.

Q. Do you remember whether or not at that time the defendant made any statement to you about that document?

A. I do not remember. Matters were discussed in a general way—all her business pertaining to the building.

Q. State whether or not you were shown two checks Defendant's Exhibits 6 and 7, which I now show you?

A. I remember some such sums as these having been discussed at the time, but do not remember whether the checks were shown me or not.

Q. Do you remember what the defendant said about the checks or the money represented by the checks?

A. No, sir; except that she was complaining in a general way that the building wasn't paying her anything and was running her into debt.

Cross-examination by Mr. WARREN:

147 Q. Mr. Manzanares, when and where did you first see, upon page 591 of the book shown you (press copy book), the copy of the receipt dated January 1st, 1892, purporting to have been executed by the plaintiff, contained on that page.

A. This I saw in my office. I don't know when it was. Before the ninth of this month, at my office in Las Vegas.

Q. In whose hands was it? Who showed it to you?

A. Mr. Justo R. Armijo showed it to me.

Q. Do you know whose copy book that is, or did you ever see it before that time?

A. No, sir; I do not.

Q. What did you say about having seen it before that time?

A. I don't think I ever saw it before.

Q. Do I understand you, Mr. Manzanares, that you have any present recollection of ever having seen the original receipt in Mrs. Armijo's possession of which the copy has been shown you in this book?

A. After the copy was shown to me I had a sort of vague recollection of some such transaction or document, but I couldn't swear that it was that particular document.

Q. And you do not now so swear?

A. No, sir.

Redirect examination by Mr. FIELD:

Q. When that copy book was shown to you at your office in Las Vegas by Justo R. Armijo, it was on the 31st day of May of this year, the same day on which you made the affidavit I now show you, was it not?

A. Yes, sir.

Mr. FIELD: I ask to have the affidavit marked for identification.

148 Marked for identification "Y."

Q. In that affidavit you said I have a rather indistinct recollection of seeing a receipt of yours to Mrs. N. T. Armijo for services rendered in full, but cannot remember the exact wording of the same, but on seeing the copy which you showed me I think it was the original of that that I saw in Mrs. Armijo's possession. I mean the copy you showed me on your copy letter book, page 591. State whether or not that affidavit correctly represents your present recollection of the transaction.

Mr. WARREN: Objected to as improper cross-examination, and calculated to impeach and contradict plaintiff's own witness. I mean improper redirect examination.

MASTER: Overruled.

A. Yes, sir; it is so indistinct in my memory that it is only by the production of these papers that I have made this statement.

That is all.

(Signed) FRANCISCO A. MANZANARES.

MAXIMO GRIEGO, called as next witness by plaintiff in rebuttal, after having been duly sworn, testifies as follows:

Direct examination by Mr. FIELD:

Q. State your name, age, residence and occupation.

A. My name is Maximo Griego. I live at Los Griegos, Bernalillo county, New Mexico. I am fifty-two years old. I am a farmer.

Q. Did you know Nicholas T. Armijo in his lifetime?

A. Yes, sir.

149 Q. How were you employed at the time of his death?

A. After Mr. Armijo died I worked at the house.

Q. Whose house?

A. At the house of Donna Barbara.

Q. Donna Barbara Chavez de Armijo?

A. Yes, sir.

Q. For how long did you work there?

A. I worked at the house, at the time that Mr. Armijo was also attending to the business for the same, for two months the first time, and then after that for three months.

Q. State whether or not you were working there in the month of June, 1892.

A. Yes, sir.

Q. State whether or not you were present in the office of that house at any time in the month of June, 1892, when Justo R. Armijo read over to Barbara Chavez de Armijo a contract. If so, when was it and who was present, and what was said and done?

Mr. WARREN: Objected to as leading.

MASTER: Overruled.

Mr. WARREN: Exception.

A. Yes, sir; I was present there, because I had gone into the office together with Urbano Martin to have him paid for a few days that he had been working for me, and when I was there Mr. Justo Armijo was reading the contract.

Q. Who was present and what was said and done?

A. When I was there, Mr. Justo Armijo read the contract, and after he finished reading it, Dona Barbara said it was all right, and then Mr. Armijo signed first and then Donna Barbara.

Q. What was the contract which was read?

A. I am not very well up in such matters, or in figures, but
150 the contract read, as I understood it, that the man was employed by the year.

Q. What was done with the contract, if you know?

A. About that time Donna Barbara told me and the man who had gone in with me to move a table that was there over a trunk, and after I did that Mr. Armijo paid the man who had gone in there with me for the five days that he had been working and he left, and I remained in and saw Mr. Armijo take a book and wet something and put this contract in and then he turned a press, a machine.

Cross-examination by Mr. WARREN:

Q. What is your business and where do you live?

A. I am a farmer. I live at Las Griegos.

Q. How long have you lived there?

A. I have lived there for a good many years. I do not remember. Ever since I was born.

Q. Where did you live in 1891?

A. I do not remember. I can't keep a memorandum, as I can't read.

Q. Can you write?

A. No, sir.

Q. Have you never been able to read or write in your life?

A. No, sir.

Q. When was it you say Mr. Justo Armijo read over a contract that you have testified about?

A. In the month of June.

Q. Of what year?

A. I do not remember the year, cannot recollect. If I would recollect I would state it.

Q. Didn't Mr. Justo Armijo have a talk with you here lately about what your evidence would be in this case?

151 A. No, sir; some time back he told me.

Q. How long were you in the employ of Justo Armijo?

A. I have been employed by him at different times, but I am not at present.

Q. You said in your direct examination that a contract was read in your presence at some time between Justo Armijo and Donna Barbara, and was put in a book; that Mr. Armijo then turned a press or machine. Would you know that book if you would see it?

A. I believe so; maybe not. I may be able to know the book.

Q. When did you last see that press copy book?

A. I saw the book there when I went in to have the man who was working for me paid, Urbano Martines.

Q. And you do not remember what year that was in?

A. I do not remember. I have a bad memory. All I remember is that it was in the month of June.

Q. How did you come to remember it was in the month of June and nothing else about it?

A. Because I can't remember. I am unable to read. It was during the month of June. I was there then at that time.

Q. Was it 1890, 1891, 1892—any one of those three years?

A. I do not remember. All I remember, it was in the month of June, the same month that we are now in.

Q. What contract, Mr. Griego, you say was read and signed at the time you talk about?

152 A. The contract that Mr. Justo Armijo was reading at the time I went in there to have the boy paid for five days that he had worked for me.

Q. And that is all you remember about it, is it?

A. All that I remember is that as we were in there myself and that boy, we were told to move a table close to a trunk that was there, and then Mr. Armijo took a book and wet one of the pages and placed the contract there.

Q. Look at this paper, marked Exhibit "2," shown you, and state if you mean to swear that the paper you speak about was a contract of which the paper now shown you is a copy. As you are not able to read, I will ask you what you will swear was contained in said paper, if anything, in addition to what you have stated, or whether you have stated all there was in the paper in question?

A. I can only state what I know. I cannot state anything else.

Q. And you have stated all you do know?

A. I have stated all I know.

Q. You would not be able to recognize a copy of the contract you are talking about if it were shown you, would you or not?

A. I may. I don't know if I hear it. I cannot state.

Q. I ask you if you should see it, a copy, would you recognize it?

A. If I see it, yes.

Q. If you were to see which, the copy? What do you mean?

A. If I hear, I look at the paper, maybe by seeing the paper I can tell it by its size.

Q. Could you recognize the handwriting?

A. I don't know, sir. I am unable to read, and I may tell by the looks of the paper.

153 Q. Will you look at this page 947 of this book now shown you and state if you can swear whether this is the book and copy you have been talking about?

A. If I see the book I don't know, looking at the paper.

Q. That might or might not be a copy of the paper you are talking about, could it?

A. I don't know, sir.

A. By looking at it or hearing it, I don't know whether this is the book. All I know is that I heard the paper read.

Redirect examination by Mr. FIELD:

Q. State whether or not the paper you heard read read as the paper which the interpreter will now read to you, Plaintiff's Exhibit "2."

Mr. WARREN: Objected to upon the ground that it is simply a rather ingenious effort on the redirect examination of the witness to call out that which properly belongs to the direct examination and thereby to lead the witness and suggest what it is desired that he should testify to.

MASTER: Overruled.

Mr. WARREN: Exception.

A. Yes, sir.

Cross-examination by Mr. WARREN:

Q. You have stated that this was the same one because it is in June, do you?

A. It was in the month of June.

Q. And that is why you say that this is the same paper, is it?

A. No, sir; that is not the paper. That was a smaller piece of paper. (Indicating by signs.)

154 Q. How much a year was Mrs. Armijo to pay Justo Armijo by the paper you saw?

A. I don't know. The amount stated was quite large, but all I know is that Mr. Armijo was to be paid by the year.

Q. But you don't swear how much?

A. No, sir; I do not remember. If I would know it I would so state. A big amount was mentioned.

his
MAXIMO (x) GRIEGO.
mark.

Witness to mark:
NESTOR MONTOYA.

URBANO MARTINES, called as the next witness on behalf of plaintiff in rebuttal, and after being sworn, testifies as follows:

Direct examination by Mr. FIELD:

Q. State your name, age, residence and occupation.

A. My name is Urbano Martines, I live at Los Griegos, Bernalillo county, New Mexico, and I am a laborer. I am going on 31 years old.

Q. Do you know Justo R. Armijo and Barbara Chavez de Armijo?

A. Yes, sir.

Q. Do you know Maximo Griego?

A. Yes, sir.

Q. Did you ever see him at the house of Barbara Chavez de Armijo, and if so when and under what circumstances?
A. I saw him all the time working at the house of Donna Barbara, and at one time relieved him and worked and stayed there five days.
Q. Where did you work in his stead for five days?
A. At the house of Donna Barbara.
Q. When was that?
155 A. I went to work first on the 15th day of the month of June, 1892.
Q. How long did you work?
A. I worked five days.
Q. State whether or not at that time you were present in the office of that house of Donna Barbara when she and Don Justo and Maximo Griego were present?

Mr. WARREN: Objected to as leading.
MASTER: Overruled.
Mr. WARREN: Exception.

A. Yes, sir.
Q. What was said and done at that time?
A. I went into the office on the 20th day of June in the morning with my godfather, Maximo Griego, for the purpose of being paid for the five days which I had worked for him, and at the very moment that we went into the office we could not immediately speak to Mr. Justo Armijo, because he was at that time reading a paper which he had in his hand, which paper was a contract which Antonia Barbara had made with Don Justo Armijo to pay him twenty-five hundred dollars a year. Then afterwards Mr. Justo Armijo signed the paper. Antonia Barbara signed after him.
Q. What was done with the paper, if you know?
A. I don't know what became of the paper after the same was signed. Mr. Armijo got up with the paper in his hands and asked me and the other man to remove a table that was in the room to another place, and after we did that he took out some money out of his pocket, a dollar and three halves, which made two and a half due me, gave them to me and I went out.

156 Cross-examination by Mr. WARREN:

Q. When do you say all this happened?
A. On the 20th day of the month of June.
Q. What year?
A. 1892.
Q. Wasn't it two silver dollars and a half-dollar he gave you?
A. No, sir.
Q. It was a dollar and three halves?
A. Yes, sir.
Q. Have you had any money since that?
A. Yes, sir; I have had a great deal of money.

Q. And you remember just how you got it, whether in halves or whole dollars, every time, do you?

A. Yes, sir.

Q. Who have you been working for the last five or six years?

A. I worked for myself.

Q. What at?

A. All kinds of labor.

Q. Can you read and write?

A. No, sir; I can't read.

Q. Have you been working for Mr. Justo Armijo since that time?

A. No, sir.

Q. Not at all?

A. No, sir; not at all.

Q. Who have you been talking with as to what your evidence would be here?

A. With no one.

Q. You didn't know anything about it until you were asked in this room?

A. Yes, sir; I knew.

157 Q. I asked you who told you before you were put on the stand here what you were to be examined about?

A. No one told me anything about what I had to say here.

Q. Who else were in the room, you say?

A. Justo Armijo, Barbara Chavez de Armijo, Maximo Griego and myself.

Q. Was it any of your business what they were doing, and did it interest you?

A. No, sir; it was none of my business.

Q. You can remember, though, everything that happened?

A. Yes, sir.

Q. Just go and tell it again, now, everything that happened, just as you told it before.

A. When I went in there I went to be paid, as I have already stated, for five days which I had worked for Maximo Griego, and as I went into the door Mr. Justo Armijo was reading a paper, and the paper read that Mr. Justo Armijo had made a contract with Donna Barbara. She was to pay him twenty-five hundred dollars a year. Then Mr. Armijo signed the paper and Mrs. Armijo signed after he did, and after they had signed the paper Mr. Armijo stood up with the paper in his hand so as to make room for us to move the table, and after that Mr. Armijo put his hand in his pocket and took out a dollar and three halves and gave them to me, and I went out.

Q. Was that paper in anybody's hands except Justo Armijo while you were there?

A. No, sir; the paper was only signed by Mrs. Armijo, and after she signed the paper remained on the table, and I don't think anybody else had it in their hands except Justo Armijo.

Q. Did anybody ask you to listen to the paper?

158 A. No, sir; no one asked me.

Q. You can't read, you say?

A. No, sir.
Q. Nor write?
A. I cannot.
Q. Where was that paper when you last saw it?
A. In the hands of Justo Armijo.
Q. Did you see him make a copy of it?
A. No, sir. I have already stated I didn't see any more than that when I saw the paper in his hand. About that time I went out.
Q. You heard him read it all through, did you?
A. Yes, sir.
Q. Had he signed it when you went out, himself?
A. Yes, sir. I was present there when both signed the paper.
Q. But you didn't see any copy made of it?
A. No, sir; I did not.
Q. Did you see this book there at the time? (Marked "1.")
A. No, sir.
Q. Can you repeat the words of that agreement which you say you heard in June, 1892?
A. Yes, sir; I can state them.
A. All I heard him read was that he had made a contract with Donna Barbara according to which she was to pay him twenty-five hundred dollars per year, commencing on the first day of January.
Q. I ask you to repeat the words, if you can remember them, of the contract. Can you do it or not?
A. Those are the same words that I heard read.
Q. What did that paper state the services to be rendered by Justo Armijo were?
A. The paper didn't state anything about the kind of services.
159 Q. For how long were these services to be rendered, whatever they were?
A. I do not know for how long he rendered the services.
Q. Did Justo Armijo or Mrs. Nicholas Armijo speak to you in regard to this contract you refer to at that time?
A. No, sir.
Q. When were you first notified that you would be called as a witness here in this case?
A. I was notified; I was not called.
Q. How did you happen to come, then?
A. I don't understand the question. I was not notified that I had to come here as a witness. I was told by the man, or asked by the man, for whom I had been working, Donna Barbara, whether I remembered of the occasion, or whether I had heard a certain paper read. I answered I did, and he told me then that I might perhaps be needed as a witness.
Q. When was that and who was that?
A. Maximo Griego was the one who asked me about it about thirteen days ago, just as I returned from the sheep ranches of Mr. Yrisarri, where I had been working.
Q. After the lapse of six years can you remember everything that

occurred in relation to a matter of no personal interest to yourself without any mistake, can you?

A. Yes, sir; I can. I have no interest whatever in the transaction.

Q. And if Justo Armijo had then and there made a copy of that paper you would have remembered it?

A. Yes, sir.

Q. But you don't remember it, you say?

A. No, sir.

160 Q. How long were you in the room there at that time, you and Maximo Griego?

A. I don't know how long I stayed, as I had no watch.

Q. Are you some relation to Maximo Griego?

A. No, sir; except spiritually. He is my godfather of mine.

Q. Where is your residence at this time?

A. Las Griegos.

Q. What is your age?

A. I am thirty; going on thirty-one.

That is all.

(Signed) URBANO MARTINES.

JESUS S. GARCIA, called as witness for plaintiff on rebuttal, after having been duly sworn, testifies as follows:

Direct examination by Mr. FIELD:

Q. State your name, age, residence, and occupation.

A. My name is Jesus S. Garcia; I reside in Albuquerque, New Mexico; I am forty-seven years old; I am clerking, book keeping.

Q. Do you know the parties to this suit, and how long have you known them?

A. Yes, sir; for the last eleven years, since I have been here. I have known them for longer than that, say fifteen or twenty years.

Q. Look at the book shown you marked for identification "1" and state whether or not you ever saw that book before, and if so, when and where?

A. Yes, sir. This is the same book that I saw in Mr. Warren's office.

Q. You mean the office of Warren, Fergusson and Gillett?

161 A. Yes, sir.

Q. When did you see it there?

A. I saw it on the twenty-fifth day of last April.

Q. State whether or not at that time you made any examination of page 988 of this book, and if so, what was contained thereon at that time.

A. On this page there was a letter written on top to a man by the name of Gillmore. Below that was a small, say about three inches or three and a half, certificate of agreement, dated on the 20th of June, 1892. I have made a memorandum of it. June 20th, 1892, $2,500. It was signed by Mrs. N. T. Armijo and Justo Armijo.

Q. What has been your business for the last fifteen or twenty years?

A. For the last fifteen or twenty years I have been—I was in the merchandise business for myself in Las Cruces; next I was probate clerk of that county; after that I was chief deputy sheriff here for eight years; then deputy assessor; again I was probate clerk of this county.

Q. During your various employments during the last fifteen or twenty years, what opportunities have you had to become familiar with handwritings?

A. A good many.

Q. Do you know the handwriting of the defendant in this case, Barbara Chavez de Armijo?

A. I have seen her signature many times.

Q. From your knowledge of her handwriting are you able to state whether or not the original of the paper that you saw copied on page 988 of that book was signed with her genuine signature?

A. Yes, sir. It was the same, her own signature as far as my knowledge is concerned—her genuine signature.

162 Q. What knowledge have you of her signature? How many times and under what circumstances have you seen it?

A. The first time I saw her signature signed that way was for a check given to me for $50. After that I was helping Mr. Armijo in balancing his bank accounts of the transactions of the estate of N. T. Armijo and I had to check up the accounts with the original checks drawn by her on the banks.

Q. How many checks have you seen signed by Mrs. N. T. Armijo?

A. Fifty or over.

Q. From your knowledge of her signature, derived as you have described, state whether or not in your opinion the paper which you saw copied on page 988 of that book, as you have described, was signed with her genuine signature?

A. I couldn't detect any difference, and I took particular attention to look at the signature, and furthermore I had a curiosity to compare it with another, and I suggested to Mr. Armijo let us look over a few pages more and see if there is another signature of hers. By looking a few pages I found another one signed the same way, Mrs. N. T. Armijo. Here is the one I compared it with, and couldn't find any difference. This one is on page 981.

Q. Now, Mr. Garcia, will you express under oath your opinion as to whether or not that was the genuine signature of Mrs. Armijo?

A. My opinion is that that was her genuine signature, as I stated before.

Q. When did you next see that book after the 25th of April, 1898?

A. This is the first time.

163 Q. Where was the book, in whose possession, when you last saw it before you saw it here today?

A. It was in the office of Warren, Fergusson and Gillett. I suppose it was in their possession. In their back office. I think Mr. Warren was present at one of the days we seen it.

Q. Do you know what became of that page 988 of that book?

A. No, sir.

Cross-examination by Mr. WARREN:

Q. Who employed you in April, 1898, and for what purpose?

A. Mr. Justo Armijo. He employed me to make the assessment-rolls.

Q. Were you then, and have you since been, in Justo Armijo's employ?

A. Yes, sir.

Q. Do you know by whom and for what purpose the letter book marked "1" with other books of the defendant was produced in April at the office of Warren, Fergusson and Gillett?

A. Really, I don't know the purpose they were there for. They must have been in charge of the lawyers. I don't really know what purpose they were there for.

Q. How many days during the month of April did you have access to this book, press copy book, with other account books at that office?

A. Only that day I saw it. The other books, we looked at them three or four times.

Q. Do you know how many days this press copy book had been at that office for examination?

A. No, sir.

Q. Did you ever see this letter-press copy book marked "1"
164 at any other time or place than on that one day at that office?

A. No, sir. If I had I never paid any particular attention.

Q. Was that on that April 25th, 1898, that day?

A. Yes, sir.

Q. Were you in that office on other days than that 25th of April examining these other books of defendant?

A. Yes, sir; three or four times.

Q. Did Mr. Justo Armijo have the free and undisturbed possession of the account books in question?

A. From what I saw, he did.

Q. On that day when you saw the letter-press copy book "1" was it in the free and undisturbed possession of Mr. Justo Armijo?

A. Yes, sir.

Q. Did he call your attention to that page 988 on that day in that book, or did you examine it yourself?

A. He called my attention to it, and I examined it myself.

Q. Do you know how long that press copy book had been in his possession at the time you say he called your attention to that page 988?

A. No, sir.

Q. When was it, with reference to the first time that you accompanied Justo Armijo to that office in connection with Mrs. Armijo's books, did you see that page 988 in that book?

A. All within two weeks from the 25th day of April.

Q. When did you say you last saw that page 988 in that book?

A. On the 25th day of April.

165 Q. That was the first and last time you saw it?

A. Yes, sir.

Q. You say that there was on that page also a copy of the letter to one Jesse Gillmore, did you not?

A. Yes, sir.

Q. Look at page C of the index of this letter book "1" and state if you know in whose handwriting the words contract and figures "988" are upon that page?

A. This writing, to the best of my knowledge, is Mr. Armijo's. It looks like it.

Q. You have seen him write, and know his handwriting, do you not?

A. Yes, sir.

Q. You say upon that page 988, below the letter to Jesse Gillmore which you have mentioned, there was what purported to be a copy of a written agreement purporting to be signed by J. R. Armijo and Mrs. N. T. Armijo?

A. Yes, sir.

Q. Did you notice any difference in the freshness of these two copies?

A. Yes, sir; I did.

Q. What purported to be the date of the letter to Jesse Gillmore and by whom was it signed?

A. That letter, I think it was dated only one day difference. I noticed that the letter was dated the 19th day of June and the agreement was dated the 20th.

Q. Any difference in the freshness of the appearance of the two copies?

A. I do not know about the freshness, but one was plainer than the other; one was a better impression than the other.

166 Q. What if anything did Justo Armijo say at the time he called your attention to that copy on page 988?

A. He said that he had found a copy of contract which he had made with Mrs. N. T. Armijo and called my attention to that.

Q. Did he say that he hadn't known where it was before?

A. He said he didn't know where it was, and he lost the original until he found the copy in the book.

Q. And that he hadn't known where it was before he found it there?

A. Yes, sir.

Q. Look at this copy now shown you and state if you know in whose handwriting that pencil copy marked Plaintiff's Exhibit "2" is.

A. This is Mr. Justo Armijo's writing and this is an exact copy of the words that was there.

Q. When did he make it; were you present?

A. No, sir. He didn't make it then.

Q. I understand you to say that you didn't see Justo Armijo make this copy, and that it is in his handwriting?

A. I didn't see him make that.

Q. After the date you saw this page 988 in the book and Justo Armijo called your attention to what purported to be a press copy of an agreement concerning which you have testified, how long did

the press copy book in question remain in the office of Warren, Fergusson and Gillett, to your knowledge?

A. I can't say. I never went there after. After that 25th day of April I never went there.

Q. Did you look through that press copy book there at that time when you saw it there on the 25th of April?

167 A. I looked at that page and I looked on several pages; yes.

Q. Do you or not know whether at that time Justo Armijo, the plaintiff, was and for a long time had been in the constant habit of signing the name of Mrs. N. T. Armijo to documents as her agent?

A. By looking through that book I seen many letters signed by Justo Armijo, for Mrs. N. T. Armijo, and I saw one signed there by her, and others signed in her full name, Barbara Chavez de Armijo. There is only one there, I think, signed Mrs. N. T. Armijo and others signed by Justo Armijo.

Q. Were there more than one letter or papers copied upon any one page of that press copy book after page 943 other than the two copies that you state appeared upon page 988 of that book on April 25th, 1898?

A. There may be some there now, but I didn't look at the book all through.

Q. Did you look at any pages of the book at that time except page 988?

A. Yes, sir; I looked at several pages.

Q. Did you look at page No. 992, to which your attention is now called?

A. No, sir; I didn't look at that. I looked further the other way.

Q. Did you at the time compare the pencil copy shown you marked Plaintiff's Exhibit "2" with the agreement bearing date June 20th, 1892, to which you have referred?

A. I never had this to compare it.

Q. When did you first see this paper pencil copy Plaintiff's Exhibit "2" for the first time?

A. I seen one similar to this in a little book which Mr. Armijo showed me, a small book about the size of that. I don't remember the dates. I saw it twice.

168 Q. You never saw any paper which purported to be the original of that copy upon page 988 of the book?

A. No, sir.

Q. I understand you that the copy of the letter addressed to Gillmore was at the top of page 988, and the copy of the agreement you have mentioned was at the bottom of that page, were they?

A. Yes, sir.

Q. And that the latter appeared plainer and fresher than the former did?

A. Yes, sir; I did.

Q. I mean the bottom one of what purported to be the agreement seemed clearer and fresher than what purported to be the letter to Gillmore on the same page?

A. I said it was a better impression—plainer.

Q. Will you look at page 992 of the book, Mr. Garcia, and state whether or not the difference between the two papers on page 988 was as great as between those upon this page 992 or not?

A. A similarity as far as the way they were copied is concerned, but the ink here, the top one, is the blackest of the two, and is what I call a better impression than the other. They are entirely different. Here the blacker and better impression is on the top, and there the better and blacker impression was on the bottom.

Q. Did you make any copy or attest any copy that was made at that time on the 25th of April of this agreement?

A. No, sir.

Q. Will you look through this book and state whether or not more than one instrument is copied in it upon one and the
169 same page after page 943 or not, and if so, upon what pages?

Mr. FIELD: Objected to; the book will show for itself.

MASTER: Sustained.

Mr. WARREN: Exception.

Q. Did you see on the 25th of April, 1898, upon page 992 of the book marked "1" copies of two instruments upon that or not?

A. No, sir; I did not.

Q. Do you know as a matter of fact, Mr. Garcia, when or by whom the copies or impressions were made of the two pages you have mentioned upon page 988, or the two made upon page 992 now shown you, were made?

A. No, sir.

Q. Did you or not ever see the originals of any of these instruments so copied in that book?

A. No, sir; I never have.

Q. And you stated all you know in reference to that page 988, have you?

A. I have.

Redirect examination by Mr. FIELD:

Q. You stated on your cross-examination, did you not, that you had never examined page 992 of that book until today?

A. I did.

Q. Do you know whether or not that Book "1" was in the office of Warren, Fergusson and Gillett prior to the 25th day of April, 1898?

A. No, sir; I do not.

Q. Then, as I understand you, so far as your personal knowledge goes, you only know that book was in that office on that one day?

A. Yes, sir.

170 Q. Where were you when Justo Armijo told you that he had found that copy of that contract?

A. Up at the club-house.

Q. When was it?

A. It was about two days before the 25th day of April.

Q. Did you go into that office between the time that he told you that he had found the copy and the time you saw the copy there?

A. I went there about three times before to examine the accounts of some of the other books.

Question repeated.

A. No, sir.

Q. Now, just what did he state to you when he told you that he had found the copy?

Mr. WARREN: Objected to as not being proper redirect examination.

MASTER: Overruled.

Mr. WARREN: Exception.

A. He said to me I have found the copy of the agreement with Mrs. N. T. Armijo for my salary, and I want you to come and see it.

Q. That was all that was said?

A. Yes, sir; that was all he said.

Q. When was it he told you that he hadn't known where it was until he found it in the book?

A. It was about two days before. I think it was Saturday, and then Sunday and Monday we went to the office.

Q. What did he say?

A. We went to the office and he said Here is the book, and opened it to the page and said Look at that, here is a copy of the agreement which I made with Mrs. N. T. Armijo, and the original, which I have lost. I looked at it and examined it and said that
171 was all right.

Q. Is that all that was said?

A. All I remember now. I don't know; there might have been a few more words.

Q. What was the appearance of that page to your eye? Was there anything unusual about it in any way?

Mr. WARREN: Objected to as leading.

MASTER: Sustained.

Mr. FIELD: Exception. I offer to show by the witness that there was nothing unusual about the appearance of the page.

Q. Describe the appearance of the page to the master.

A. I didn't see anything unusual about the page except that the impression of the agreement was plainer and probably different ink than the other one. Justo said to me, Look at that well; I want you to be a witness that that exists here, and look at the page, and I marked it down on my memorandum book here—the page, date and everything else.

(Signed) J. S. GARCIA.

It now being time to adjourn, the taking of proofs is adjourned until tomorrow morning.

Tuesday, June 14th, 1897.—The taking of proofs resumed pursuant to adjournment.

Present as before and Summers Burkhart, who appears as attorney for the plaintiff.

NEILL B. FIELD, being duly sworn as a witness on behalf of plaintiff, being examined, testifies as follows:

Direct examination by Mr. BURKHART:

Q. What is your name, residence and occupation?

172 A. My name is Neill B. Field, I reside in Albuquerque, New Mexico, and I am an attorney-at-law.

Q. You are the attorney for the plaintiff in this cause, are you not?

A. I am.

Q. Mr. Field, look at book handed you, marked for identification "1" and state whether or not you have ever seen it before, and if so, when, where and under what circumstances did you first see it?

A. I first saw this book at the office of Messrs. Warren, Fergusson and Gillett, in Albuquerque, on, I think, the 25th day of April, 1898. I went to look at the book at the request of J. R. Armijo, the plaintiff in this case.

Q. Did you at that time examine page 988 in that book or not?

A. I examined a page in the book which I believe to have been 988, but I took no notice of the page, and paid no attention to it. From an examination I have made of the book since I am satisfied that page 988 was one of the pages shown to me by Mr. Armijo and examined by me.

Q. State whether or not you, at that time and place, saw in that book a page containing what purported to be a contract between the plaintiff and the defendant in this case which is not now in that book.

A. When I examined the book there was contained in it what purported to be an impression copy of a contract between the plaintiff and the defendant. That copy is not now in the book, and I am morally certain that it was contained on page 988, which has been torn out of the book since I examined it.

Q. Can you state the substance of a contract between the plaintiff and defendant in this case, as contained in the page which is now missing from the book?

173 A. I am satisfied that Plaintiff's Exhibit No. "2" is a substantial copy of the contract as it was contained in the book. I have never compared the two, nor do I pretend distinctly to remember the language of the contract, but the substance of it was very clear in mind and conforms to Plaintiff's Exhibit "2."

Q. Was there anything on the page which contained that contract other than the contract, if you remember?

A. There was what purported to be a copy of another instrument.

Q. Do you remember what that other instrument was?

A. I am very sure it was a letter, but I have no distinct recollection about it.

Q. What was the position on the page of the contract with reference to the other instrument?

A. The letter occupied more than half the page, a little more than half; that is to say the signature to the letter as copied on the page was just below the center line of the page. The contract occupied, I should think, two and a half or three inches of space immediately below the letter.

Q. What was the appearance of the page with reference to whether or not both—copies of both instruments were made at the same time?

A. I looked at the page with a view to determining if I could how many times it had been wet, and I could form no opinion on the subject.

Q. Do you know the signature of Mrs. N. T. Armijo?

A. No, sir.

Cross-examination by Judge WARREN:

174 Q. Do you remember the dates of the two instruments that appeared on that page; that is to say, the letter and the other instrument copied upon that page.

A. I don't remember the dates of either one of them, Judge Warren, and if I said anything in my direct examination that would lead you to believe that I recollected anything in regard to the dates, I want to correct it now. I do remember that they were not the same dates, and that is why I looked at the page with a view to determine how many times it had been wet.

Q. Do you remember, Mr. Field, the comparative distinctiveness, or otherwise, of the two copies on that page, and the character of the ink as to whether it was the same in both copies or not?

A. There was absolutely nothing about the two copies which distinguished one from another as to ink, time or anything else, because I examined both of them carefully with a view to seeing if I could tell whether different ink had been used or copies made at different periods of time.

Q. You do not know as a matter of fact at what period of time, with reference to their respective dates, these two impressions were made upon that page, do you?

A. No, sir.

Q. What, if anything, was there to raise any question in your mind at that time, April 25th, 1898, as I understand you, as to whether or not these two copies upon that page had or had not been made at the time of their respective dates?

A. There was nothing, except that I could not understand upon what theory this case was being defended if that was a genuine instrument.

175 Q. You prepared the declaration in this case did you not as attorney?

A. It was prepared in my office and under my direction and is signed by me.

Q. Had you declared upon this alleged agreement of which you saw the copy on April 25th, 1898, or had you filed in said cause or served upon the defendant in said cause any copy of said alleged agreement prior to April, 1898?

Mr. BURKHART: Objected to as not proper cross-examination. And because the declaration speaks for itself as to what was done.

MASTER: Overruled.

Mr. BURKHART: Exceptions.

A. The declaration contains no special account upon a contract, no copy of any contract was served on defendant so far as I know, and none is filed with the declaration, except for the fact that my signature is appended to this declaration, I could not say that I had ever had anything to do with it, because at this time this declaration was prepared and filed I had a large amount of work on hand and had two young men in my office who looked after this sort of details.

Q. And as a matter of fact I understand you had not seen and your attention had not been called to the alleged agreement copied upon that page 988 until the 25th of April of this year?

Objected to as not proper cross-examination.

MASTER: Overruled.

Mr. BURKHART: Exception.

A. I had not seen the copy prior to the time mentioned, my attention was called by my client to the fact that he believed that copy was contained in that book before I saw the book and to the fact that the contract had been lost or as my client claimed stolen
176 out of his desk was a fact with which I have been familiar as far back as my memory goes in connection with this case.

Q. How long before April 25th of this year was it plaintiff stated that a copy of the agreement in question was contained in that book?

A. When I first commenced to prepare this case for trial, I can't tell the date but it was the first consultation that I had with my client when I was getting ready for trial of the case, he told me he believed that there was a copy of the contract in a letter book in the possession of the defendant.

Q. Can you state about what date that was?

A. I should think it was some time in March, it may have been February, but I am not definite about the date as I can't fix it in any other way.

Q. You mean of this year?

A. Yes, sir.

Q. I understand you are not a practical copyist of instruments in such a book as this here?

A. I have copied letters in my life, but I know nothing about it; I make no pretensions of my knowledge about such matters.

Q. In whose possession was this book, Mr. Field, at the time you saw it on April 25th?

A. The book was exhibited to me by the plaintiff in the office of the defendant's attorney.

Q. Was it or not in his free and undisturbed possession at the time you saw it so far as you know?

A. It was in his custody at that time in a room in that office.

Q. You had procured an order as attorney for plaintiff upon defendant to produce this book with other books for the inspection of your client the plaintiff, at that place, had you not?

177 A. I thought I had. The judge had signed such an order, but I am unable to find it; it was never entered. I understood the books were produced in pursuance to an order of the court.

Q. Have you any personal knowledge how long that is, how many days the press copy book with other books had been deposited at the office of Warren, Fergusson and Gillett for examination by the plaintiff prior to the date when you saw them there?

A. I have this knowledge on the subject. The day before I was in the office of Warren, Fergusson and Gillett, I saw the senior counsel for defendant, Judge Warren, on the street, and told him that my client complained that two letter-press copy books which he wanted to examine had not been produced and asked Judge Warren to see that they were produced; Judge Warren agreed to do so, and the next day I saw the books in Judge Warren's office as I had detailed. I fixed the date as the 25th of April by the fact that I am very clear that it was on Sunday that I talked to Judge Warren; Sunday was the 24th. If I am mistaken about its having been Sunday that I talked to Judge Warren, then I am mistaken about the date being the 25th.

Q. At the time you saw this press copy book "1" in the office of Warren, Fergusson and Gillett in April last, you know whether or not there was a letter press and means for making copies in that book there and subject to the use of the plaintiff or not?

A. I do not.

Redirect examination by Mr. BURKHART:

Q. State whether or not the date of your employment as attorney by Mr. Armijo any statement was made by him as to the existence of any contract between him and Mrs. Armijo with reference

178 to his employment by her and to his services for her?

Mr. WARREN: Objected to as not proper redirect examination.

MASTER: Sustained.

Mr. BURKHART: Exception.

That is all.

(Signed) NEILL B. FIELD.

Defendant offers to read in evidence the deposition of Jesse Gillmore, taken under a commission issued out of this court on May 28th, 1898.

Mr. FIELD: Plaintiff objects to the deposition of Jesse Gillmore and to the answers of the witness upon the ground that it does not appear that the officer taking the deposition is qualified to take the

same, that the same is not certified as required by the laws of the Territory of New Mexico. And the plaintiff objects to answers to interrogatories as follows: To answer to interrogatory No. 3 because it appears from the answer that the witness is not testifying from his personal knowledge of facts but is testifying to his conclusions and because the matter testified about is irrelevant, incompetent and immaterial, and the defendant is attempting by this testimony to inject into the case a purely collateral inquiry. I make the same objection to the answer to the fourth interrogatory. To the answer to the fifth interrogatory plaintiff objects upon the ground that correspondence between defendant and the witness Gillmore is wholly incompetent for any purpose, and plaintiff objects to the whole deposition because it attempts to inject into the case a collateral inquiry and tends to shed no light on the facts at issue.

It now being time to adjourn the taking of proofs is adjourned until tomorrow morning at ten o'clock.

179 Wednesday morning, June 15th, 1898, the taking of proofs resumed pursuant to adjournment.

Present as before.

REFEREE: The deposition of Jesse Gillmore will be admitted.

(Deposition marked Defendant's Exhibit "15.")

Sirrebuttal.

Defendant calls as his next witness S. B. GILLETT, who, after having been duly sworn, testifies as follows:

By Mr. WARREN:

Q. What is your name, and where do you reside, and what is your occupation?

A. My name is S. B. Gillett, I reside in Albuquerque, New Mexico, and I am an attorney-at-law.

Q. Look at this letter-press copy book marked "1" for identification and state when, where and whose possession the same was during the month of April last?

A. I think that on the 20th day of April of this year there was a rule upon us to produce this book; I mean by us, the firm of Warren, Fergusson and Gillett, to produce this among other books and statements. I thereupon went to the house of the defendant and got this and another book, I think. The other books that we were ruled to produce had already been brought to our office, as I remember, and I think I also got a small book called a laborers' book. I brought it to our office and put it in the back room, where Mr. Armijo had access to it and to the other books for several days.

Q. You mean the plaintiff, Justo R. Armijo?

A. Yes, sir.

Q. Describe the location of that back room and also state
180 for what length of time and the circumstances under which the book was in plaintiff's possession during that time.

A. As I said, the room is the back room to our offices, that is

used by us as a book-room, letter-press room, and also there is an office desk in there; we do not often use it ourselves, excepting to answer the telephone and make letter-press copies of our letters, the letter press being in that room. Mr. Armijo was in that room, sometimes alone, sometimes accompanied by Mr. Jesus Garcia, and on one occasion or more, one of the Mr. Yrissarris, I don't know his first name, was with Mr. Armijo in that room and I think working on the books; and I remember that Mr. Field was up one time and walked back into the room where I remember Mr. Armijo was. Sometimes Mr. Armijo was in the room alone; I mean to say that when there was no one in our office at all unless it was our young lady stenographer, who was out in the stenographer's office.

Q. State what the facilities there were for making letter-press impressions of writings?

A. There was every facility; an iron letter press, cloths, water, and oil boards.

Cross-examination by Mr. FIELD:

Q. Isn't it a fact, Mr. Gillett, that the order for production of these papers was signed by Judge Crumpacker on the morning of the 20th of April, when you and I were at the court-house; that in the afternoon of that day you telephoned me that the books were at your office; that on the morning of the 21st the plaintiff went to your office and examined the books, and on the afternoon of the 21st I telephoned you that my client complained that there were two letter-press copy books and a small laborers' book which
181 were not among the books produced; that you replied that you would get them; that on the morning of the 22nd, you telephoned to me that you had been to the house of defendant for the letter-press copy book and she had said that she didn't have any?

A. No, my recollection is that you had made a request on us to produce the books prior to the 20th of April and we had produced all the books excepting the letter-press copy books and laborers' books and after the rule was entered, I again inquired of Mr. Armijo or you, the exact books required which had not been produced and he or you said they were letter-press copy books; I then went to Mrs. Armijo and she said she didn't know of any other books in her possession; that she had already produced all she had; I think I reported this to Mr. Armijo, the plaintiff, and he insisted that she had them and described them to me; I then went to her house again and described the books to her and she then got them and delivered them to me.

Q. Isn't it also a fact that you stated to me in this same conversation over the telephone that Judge Warren was in Santa Fé and that as soon as he returned that he would get the books?

A. Yes, but that was some days prior to the entry of the rule, and I also stated to you at that time, I think, that no rule would be required.

Q. Didn't Judge Warren return from Santa Fé, on Saturday night, the 23rd of April?

A. I don't know what date, he afterwards returned, I don't know what date it was.

Q. Didn't I have a conversation with Judge Warren in the street in front of your office after his return from Santa Fé and
182 didn't you pass along while we were talking; didn't Judge Warren go over and speak to you, and didn't you then go to Mrs. Armijo's house and get the letter-press copy books, and wasn't that after Judge Warren returned from Santa Fé?

A. I don't remember about your conversation with Judge Warren, but I do know that I never got these books until after the rule was entered but we tried to get them before, and didn't want the rule entered, because we wanted to show to you every courtesy and you will probably remember that you stated to Judge Crumpacker at the time the rule was entered that you did not believe that there was any disposition on our part to keep the books from you or words to that effect.

Q. When you say our part, you mean on the part of the attorneys?

A. Yes, sir.

Q. The point to which I especially direct your attention, Mr. Gillett, isn't it a fact that you never succeeded in getting these letter-press copy books to the office of Warren, Fergusson and Gillett until after Judge Warren returned from Santa Fé?

A. No, I think it was after his return and also after the order was entered.

Q. Warren, Fergusson and Gillett have three rooms?

A. Four.

Q. The room in which these books were kept was the room in which all the books of Warren, Fergusson and Gillett were also kept?

A. No, sir; three walls of that room are occupied with books, and we have four rooms and books are in all the rooms.

183 Q. What proportion of the books of the firm are kept in that back room?

A. I don't know what proportion; I think I can tell you what decisions are in that room, probably a third.

Q. What I want to know is, how frequently the members of that firm were in the habit of going into that room for books?

A. That would depend entirely upon how often we had occasion to consult any of the books that were in that room.

Q. The telephone was in there wasn't it?

A. Yes, sir.

Q. The door was always kept open, wa-n't it?

A. So far as I know it was.

Q. The room in which the books were kept immediately joined the room which was the main entrance to the office, didn't it?

A. No, sir; there is an intervening room between it and the main entrance to the office.

Q. All of the press-copying was done for the firm, was done in that room, was it not?

A. Yes, sir.

Q. When you finally got these books, letter-press copying books, what person delivered them to you?

A. Mrs. Armijo, the plaintiff in this case, at least she was present. I think she delivered them herself. The reason I know she was present, I asked her if there were any contracts in the books and she told me there was and showed me the page on which it was.

Mr. FIELD: I move to strike out the last part of the answer of the witness as not being responsive to the question.

MASTER: Sustained.

184 Q. Now when the book was taken away from the office of Warren, Fergusson and Gillett, who took it away?

A. Miss Armijo.

Q. Eloise you mean?

A. Yes, sir.

Q. Did she make any explanation of why she wanted the book when she took it away?

A. No, sir; if she had I wouldn't have let her had it.

Redirect examination:

Q. You remember about the date Eloise Armijo took the books from the office of Warren, Fergusson and Gillett?

A. I am not sure about that. But I think it was the 27th of April last.

Q. About how many days at the time she took it away had the press copy book been in the back room of the office, and subject to the control of the plaintiff?

Mr. FIELD: Objected to as not redirect examination.

MASTER: ——.

Mr. WARREN: Question withdrawn.

Q. Is there anything else in this connection, Mr. Gillett, you have not testified to?

A. No, sir.

That is all.

(Signed) S. B. GILLETT.

Mr. WARREN: That is the case of defendant.

Mr. FIELD: I have no further testimony.

And thereafter, on, to wit, the second day of September,
185 1898, there *was* filed in the office of the clerk of said court in said cause, exceptions to referee's report and motion to set same aside, which said exceptions and motion are in words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court, Second Judicial District.

JUSTO R. ARMIJO
vs.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

The defendant herein, Barbara Chavez de Armijo, comes and excepts to the report of W. D. Lee, Esq., referee herein, dated August 15th, 1898, and filed in the office of the clerk of said court on August 18, 1898, upon the grounds hereinafter specified, to wit:

First. For that the said referee erroneously reported that there was due to the said plaintiff from the said defendant on August 15th, 1898, a balance of $6,097.92; whereas the said referee should have reported a balance of a large amount due from the plaintiff to the defendant on said account.

Second. For that the said referee erroneously admitted in evidence secondary proof of the contents of the alleged contract between said parties purporting to have been copied upon page 988 of the letter-press copy book, marked Exhibit 1, for identification, over defendant's objection.

Third. For that the said referee erroneously admitted the paper-writing, Plaintiff's Exhibit 2, for identification, over defendant's objection.

Fourth. For that the said referee erroneously overruled the objections of the defendant to the admission and rejection of evidence upon the hearing, which objections appear noted in the report of the said referee and each one of which objections and exceptions is hereby referred to and made part hereof as fully as if the same were incorporated herein.

186 Fifth. For that the findings of fact by said referee are against the evidence in said cause, taken and reported by said referee.

Sixth. And for that the conclusions of law by said referee are insufficient and erroneous.

Seventh. For other errors prejudicial to the defendant and apparent upon the record and of said report.

Wherefore the defendant prays the court that the said report be set aside and that the said cause be again referred with proper instructions to the referee.

WARREN & FERGUSSON,
Attorneys for Defendant.

Service of copy acknowledged this Sept. 2nd, 1898.
NEILL B. FIELD,
Per A. B. READING.

(Endorsed: Filed in my office this September 2nd, 1898. Harry P. Owen, clerk.)

And thereafter, on to wit, the 15th day of September, 1898, there was an order duly made and entered and filed in said cause, which said order is in words and figures following, to wit:

TERRITORY OF NEW MEXICO:

Bernalillo District Court.

JUSTO R. ARMIJO, Plaintiff,
vs.
BARBARA C. DE ARMIJO, Defendant. } No. 4728.

Judgment.

This cause coming on to be heard upon the exceptions of the defendant to the report of Wm. D. Lee, referee herein, heretofore filed in this cause and the court having seen the said exceptions and the said report and having heard counsel for the said defendant
187 in support of the said exceptions and being now sufficiently advised of and concerning the same—

It is considered, ordered and adjudged by the court that the said exceptions be and each of the same hereby is overruled and denied, and that the report of the said referee be and the same hereby is in all things approved and confirmed.

It is further considered, ordered and adjudged by the court that the findings of the said referee herein be and the same are hereby adopted as the findings of this court and in pursuance thereof and in accordance therewith it is considered, ordered and adjudged by the court that the plaintiff, Justo R. Armijo, do have and recover of and from the defendant, Barbara Chavez de Armijo, the sum of six thousand and ninety-seven dollars and ninety-two cents ($6,097.92) with interest thereon at the rate of six per cent. per annum from the 15th day of August, 1898, until paid together with his costs in this behalf expended to be taxed, including the sum of one hundred and fifty dollars ($150.00) which is hereby allowed to the said referee for his compensation in the said cause and the sum of sixty-nine and $\frac{75}{100}$ dollars ($69.75) which is hereby allowed for the services of the stenographer employed by the referee by consent of the parties in taking down and transcribing the testimony before the referee herein, not including the extra copies of the said testimony furnished by the stenographer to the respective parties in the cause, and that he have execution therefor.

And thereupon the defendant, by her attorney, gives notice of an appeal to the supreme court of the Territory of New Mexico.

(Signed) J. W. CRUMPACKER, *Judge.*

188 (Endorsed: Filed in my office this September 15th, 1898. Harry P. Owen, clerk.)

And thereafter, on, to wit, the 4th day of October, 1898, there was filed in the office of the clerk of said court in said cause, a super-

supersedeas bond, which said bond is in words and figures following, to wit:

Know all men by these presents that we, Barbara Chavez de Armijo, as principal, and Mariano S. Otero, Juan C. Armijo, Eloise Armijo *are* sureties, all of the county of Bernalillo and Territory of New Mexico, are held and firmly bound unto Justo R. Armijo of said county and Territory in the penal sum of thirteen thousand ($13,000.00) dollars, for the payment whereof they respectively bind themselves and their respective real and respective representatives firmly by these presents.

The condition of the above obligation is such that whereas, on, to wit, September —, 1898, in the district court for the county of Bernalillo and Territory of New Mexico, judgment was rendered in a certain cause therein pending, wherein Justo R. Armijo is plaintiff and Barbara Chavez de Armijo is defendant, in favor of said plaintiff and against the said defendant for the sum of six thousand and ninety-seven ($6,097.92) dollars and ninety-two cents, with interest thereon from August 15th, 1898; and whereas the above-bounden Barbara Chavez de Armijo, defendant in said action, has prayed an appeal from said judgment to the supreme court of the Territory of New Mexico:

Now, therefore, the condition of the above obligation is such that if the said appellant Barbara Chavez de Armijo shall prosecute her said appeal from said judgment with due diligence in said
189 supreme court, and if said judgment appealed from shall be affirmed, or if her said appeal shall be dismissed, said appellant shall pay the said judgment so rendered against her in said cause and all costs that may be adjudged against her in the said supreme court in said appeal, then the above obligation shall be void, but otherwise the same shall remain in full force and effect.

In witness whereof said parties hereto have respectively hereunto set their hands and seals this October 3rd, 1898.

BARBARA CHAVEZ DE ARMIJO. [SEAL.]
MARIANO S. OTERO. [SEAL.]
JUAN C. ARMIJO. [SEAL.]
ELOISA ARMIJO. [SEAL.]

TERRITORY OF NEW MEXICO, } ss.
County of Bernalillo, }

Before me the undersigned notary public within and for said county and Territory this day came Mariano S. Otero, Juan C. Armijo and Eloisa Armijo, who are respectively known to me to be the identical persons who executed and whose names are subscribed to the foregoing appeal bond and severally acknowledged, each for himself, that he executed the said bond for the purposes therein mentioned;

And the said Mariano S. Otero, being by me duly sworn, says that he is worth the sum of thirteen thousand dollars in property situated in said county and Territory over and above his just debts and liabilities and subject to execution therein;

And the said Juan C. Armijo, being by me duly sworn, says that he is worth the sum of three thousand dollars in property situated in said county and Territory and subject to execution therein, over and above all his just debts and liabilities;

And the said Eloisa Armijo, being by me duly sworn, says that she is worth the sum of three thousand dollars in property
190 situated in said county and Territory and subject to execution therein, over and above all her just debts and liabilities.

In witness whereof I have hereunto set my hand and affixed my notarial seal this October 3rd, 1898.

[NOTARIAL SEAL.] H. LOCKHART, JR.,
Notary Public.

Approved by me this 3rd day of October, 1898.
J. W. CRUMPACKER, *Judge.*

Done at chambers, October 3rd, 1898.

(Endorsed: Filed in my office this October 4th, 1898. Harry P. Owen, clerk.)

And thereafter, on to wit, the 13th day of July, 1899, there was filed in the office of the clerk of said court, in said cause, a motion, which said motion is in words and figures following, to wit:

In the District Court, County of Bernalillo, Territory of New Mexico.

JUSTO R. ARMIJO, Plaintiff,
vs.
BARBARA CHAVEZ DE ARMIJO, Defendant. } No. 4728.

The defendant moves the court for an order directing the clerk of this court to enter an order granting an appeal from the final judgment herein, as of date of October 4th, 1898.

And for ground of this motion states that on said date an appeal was taken by the said defendant, and allowed by the court to the supreme court of this Territory; and the appeal bond of said defendant was approved and filed on said date; and the taking
191 of said appeal does not sufficiently appear upon the record or minutes of the court.

WARREN & FERGUSSON,
Defendant's Attorneys.

H. L. Warren, being duly sworn, says he is one of the attorneys for defendant in said cause, and that he knows the contents of the above motion, and that the facts therein stated are true to the best of his knowledge and belief.

H. L. WARREN.

Subscribed and sworn to before me this July 13th, 1899.
[NOTARIAL SEAL.] JUSTO L. ARMIJO,
Notary Public.

To said plaintiff and Hon. N. B. Field, his attorney:

You are hereby respectively notified that the defendant will call up the motion, a copy of which is attached hereto, on the 19th day of July, 1899, before Hon. J. W. Crumpacker, judge of said district court, for the county of Bernalillo, at the court-house at Albuquerque, N. M., at ten o'clock a. m. of said day or as soon thereafter as counsel can be heard.

WARREN & FERGUSSON,
Attorneys for Defendant.

Copy served by delivery of same at the office of plaintiff's attorney, Hon. N. B. Field, to Mr. Ralph Hunt, his clerk, on this July 13th, 1899.

H. L. WARREN.

(Endorsed: Filed in my office this July 13th, 1899. Harry P. Owen, clerk.)

And thereafter, on to wit, the 20th day of July, 1899, there was an order duly made by the court, in said cause, and filed and entered of record in the office of the clerk of said court, which said order is in words and figures following, to wit:

192 JUSTO R. ARMIJO vs. BARBARA CHAVEZ DE ARMIJO. } No. 4728.

The motion of defendant filed herein on July 13th, 1899, for an order directing the clerk to enter upon the minutes an order granting an appeal from the final judgment herein as of the date of October 4th, 1898, for the reason that as claimed by the defendant *that* such appeal was then taken and allowed, and a supersedeas bond was then approved and filed, having come on to be heard and having been argued by counsel and submitted to the court, the said motion is overruled and denied by the court. To which order and ruling of the court, the defendant, by her attorneys, then and there duly excepted, and now excepts.

(Signed) J. W. CRUMPACKER, *Judge.*

(Endorsed: Filed in my office this July 20, 1899. Harry P. Owen, clerk.)

And thereafter, on to wit, the 15th day of September, 1899, there was lodged in the office of said clerk of said court, a writ of error, which said writ is hereto attached and is in words and figures following, to wit:

Territory of New Mexico to the district court of the 2nd judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, Greeting:

Because in the record and proceedings, and in the rendition of judgment, in a certain cause lately pending before you, wherein Justo R.

Armijo was plaintiff, and Barbara Chavez de Armijo was defendant, error has intervened, as it is said, to the damage of the said
193 Barbara Chavez de Armijo, and we being willing that such error, if any there be, should be corrected, and speedy justice done in that behalf, do command you, if judgment therein be given, that then under your seal, distinctly and openly, you send a copy of the record and proceedings aforesaid, to the supreme court of the Territory of New Mexico, together with this writ, so that you have the same in the said supreme court on the first day of the next term thereof, to be begun and held on the first Wednesday after the first Monday in January, A. D. 1900, at Santa Fé, in said Territory, in pursuance of law.

Witness the Honorable William J. Mills, chief justice of the supreme court of the Territory of New Mexico, and the seal of the said court, this 14th day of September, A. D. 1898.

[SEAL.] JOSE D. SENA, *Clerk.*

And thereafter, on to wit, the 20th day of October, 1899, there was filed in the office of the clerk of said court, in said cause, a præcipe for transcript, which said præcipe is in words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico.

JUSTO R. ARMIJO
vs.
BARBARA C. DE ARMIJO. } No. 4728.

To Harry P. Owen, clerk:

You will please make out a transcript to be used in the above cause on appeal, of the following:

1. Declaration.
2. Defendant's pleas.
3. Replication.
4. Order of reference.
5. Report of referee and oral testimony taken before referee.

194 6. Exceptions to referee's report and motion.
7. Final decree.
8. Supersedeas appeal bond and approval thereof.
9. Motion of defendant for entry of appeal.
10. Order overruling same.
11. This præcipe.

WARREN & FERGUSSON,
Attorneys for Defendant.

(Endorsed: Filed in my office this 20th day of October, 1899. Harry P. Owen, clerk.)

I, Harry P. Owen, clerk of the district court of the second judicial district of the Territory of New Mexico, within and for the county of Bernalillo, in accordance with the command contained in the fore-

going writ of error, make return thereto by sending to the supreme court of the Territory of New Mexico the foregoing, which I hereby certify to be a true, correct and complete transcript of so much of the record and proceedings had in that certain cause lately pending in the district court for the county of Bernalillo, wherein Justo R. Armijo was plaintiff and Barbara Chavez de Armijo was defendant, as was ordered to be certified by the defendant in error, Barbara Chavez de Armijo, in said cause, as the same appears of record and on file in my said office.

In witness whereof I have hereunto set my hand and affixed the seal of said court on this 2nd day of November, A. D. 1899.

[SEAL.] HARRY P. OWEN, *Clerk.*

195 Now on this 18th day of November, A. D. 1899, comes the defendant, by her attorneys, and presents to the court the foregoing bill of exceptions to be by the court sealed, signed and settled as such, notice thereof having been duly given to plaintiff, he being present by counsel, but the court declines and refuses to so sign, seal and settle the same, whereupon defendant excepts to the action of the court.

J. W. CRUMPACKER, *Judge.*

196 And afterwards, to wit, on the 14th day of December, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an assignment of errors; which said assignment of errors was and is in words and figures as follows, to wit:

Assignment of Errors.

Now comes the plaintiff in error, defendant below, and says that there is manifest error in the record and proceedings in said cause in the court below in this, to wit:

1. The court erred in overruling the defendant's objections to the report of the referee, and motion to set the same aside upon the grounds specified therein. (Transcript of Record, pp. 185, 186.)

2. The court and referee erred in admitting in evidence secondary evidence of the contents of the alleged copy of contracts between the parties of which Complainant's Exhibit 2 is a copy. (Record, p. 26, *et seq.*)

3. The court and referee erred in admitting evidence of value of the alleged services of plaintiff below. (Record, p. 37, *et seq.*)

4. The court and referee erred in overruling the objections of the defendant below to evidence offered on the part of plaintiff below. (See pp. 47, 91, 117, 135, 170, *et seq.*, Transcript of Record.)

5. The court and referee erred in excluding competent evidence offered by defendant below. (See pp. 113, *et seq.*, Transcript of Record.)

6. The findings of fact by the referee, approved by the court below, are against the evidence.

7. The conclusions of law found by the referee and approved by court are insufficient and erroneous.

8. The court erred in overruling the motion of plaintiff in error, the defendant below, for entry of an order granting an appeal herein. (Transcript, p. 192.)

9. Other errors apparent upon the face of the record.

WARREN & CHAVEZ,
Attorneys for Plaintiff in Error.

197 And afterwards, to wit, on the 23rd day of December, A.D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a notice and motion to affirm judgment; which said notice and motion was and is in words as follows, to wit:

TERRITORY OF NEW MEXICO:

In the Supreme Court, January Term, A. D. 1900.

BARBARA CHAVES DE ARMIJO, Appellant,
vs.
JUSTO R. ARMIJO, Appellee. } No. 847.

BARBARA CHAVES DE ARMIJO, Plaintiff in Error,
vs.
JUSTO R. ARMIJO, Defendant in Error. } No. 840.

Notice of Motion.

To Barbara Chaves de Armijo, plaintiff in error and appellant, and to Messrs. Warren & Chavez, her attorneys:

You will please take notice that the undersigned, attorney for appellee and defendant in error in the above-entitled cause, will move the honorable the supreme court of the Territory of New Mexico, at Santa Fé, in said Territory, on the 3rd day of January, 1900, at the hour of ten o'clock a. m., or as soon thereafter as counsel can be heard, to strike from the transcript filed in each of the causes so much and such parts thereof as purport to set forth the evidence adduced on the hearing of the cause sought to be reviewed
198 and to affirm the judgment of the court below and to enter judgment in this court against said appellant and the sureties on her supersedeas bond in cause No. 847 for the amount of said judgment and interest and ten per cent. damages, for the reasons set forth in the motion, a copy of which is hereto annexed, and you can appear and resist the said motion if you see fit to do so.

NEIL B. FIELD,
Attorney for Justo R. Armijo, Appellant and Defendant in Error.

Service of a copy of the foregoing notice, with copy of motion thereto attached, admitted this 23rd day of December, 1899.

WARREN & CHAVEZ,
Attorneys for Appellant and Plaintiff in Error.

TERRITORY OF NEW MEXICO:

In the Supreme Court, January Term, A. D. 1900.

BARBARA CHAVEZ DE ARMIJO, Appellant,
vs.
JUSTO R. ARMIJO, Appellee. } No. 847.

BARBARA CHAVEZ DE ARMIJO, Plaintiff in Error,
vs.
JUSTO R. ARMIJO, Defendant in Error. } No. 840.

Motion to Affirm Judgment.

Comes now Justo R. Armijo, appellee and defendant in error in the above-entitled cause, by Neil B. Field, his attorney, and moves the court to strike from the transcript filed in each of said causes so much and such part thereof as purport to set forth the evi-
199 dence adduced on the hearing of the cause sought to be reviewed, and to affirm the judgment of the court below and to enter judgment in this court against the appellant and the sureties on her supersedeas bond in cause No. 847 for the amount of said judgment and interest and for ten per cent. damages, for the following reasons:

I.

Because no question of law is properly reserved for determination by this court upon the record as made up.

II.

Because no motion for new trial was filed in the court below within ten days after the rendition of the judgment sought to be reviewed, as required by law.

III.

Because what purports to be the oral testimony taken before the referee in said cause is not authenticated as required by law, and is therefore not a part of the record.

IV.

Because if affirmatively appears from the transcript that the documentary evidence used before the referee was omitted from the transcript by direction of the attorneys for plaintiff in error and appellant, and the sufficiency of the evidence to support the findings and judgment cannot be reviewed, if waht purports to be the oral evidence were properly authenticated.

V.

Because the so-called assignment of errors is insufficient and does not require an examination of alleged errors at the hands of the court.

VI.

Because the so-called brief of appellant and plaintiff in error is in no sense a brief, but amounts to a mere evasion of the rules of the court requiring briefs to be filed.

VII.

Because the appeal and writ of error have operated to stay
200 proceedings on the judgment of the district court, and appear to have been taken and sued out merely for delay.

NEILL B. FIELD,
Attorney for Appellee and Plaintiff in Error.

And afterwards, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fé, the seat of government, on the first Wednesday after the first Monday in January, the same being the 3rd day of January, in the year of our Lord one thousand nine hundred, on the second day thereof, the same being Thursday, January 4th, A. D. 1900, the following, among other, proceedings were had, as follows, to wit:

BARBARA CHAVES DE ARMIJO, Plaintiff in Error, *vs.* JUSTO R. ARMIJO, Defendant in Error.	No. 840. Error to District Court, Bernalillo County.

This cause coming on to be heard upon the motion of the defendant in error for an affirmance of judgment, the same was argued by Neill B. Field, Esq., for defendant in error, and H. L. Warren, Esq., for plaintiff in error, and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

BARBARA CHAVES DE ARMIJO, Appellant, *vs.* JUSTO R. ARMIJO, Appellee.	No. 847. Appeal from District Court, Bernalillo Co.

This cause coming on to be heard upon a motion of appellee for an affirmance of judgment, the same was argued by Neill B. Field, Esq., for appellee, and H. L. Warren, Esq., for appellant, and submitted to the court, and the court, not being sufficiently advised in the premises, takes the same under advisement.

201 And afterwards, to wit, on the twelfth day of said regular term, the same being Tuesday, the 16th day of January, A. D. 1900, the following, among other, proceedings were had as follows, to wit:

BARBARA CHAVES DE ARMIJO, Plaintiff in Error and Appellant,
vs.
JUSTO R. ARMIJO, Defendant in Error and Appellee.

Nos. 840–'7. Error to and Appeal from District Court, Bernalillo County.

This cause having heretofore been heard on the motion of appellee and defendant in error to strike out portions of the transcript, and to affirm the judgment of the court below, and to enter same against the appellant in No. 847 and the sureties on her supersedeas bond, with ten per cent. damages, and the court having had the same under advisement and being now fully advised in the premises, it is considered, adjudged, and decreed by the court that the motion of the defendant in error and appellee to affirm the judgment of the court below on the ground that no motion for a new trial was filed in said cause, and to enter same against appellant and the sureties on her supersedeas bond, be, and the same hereby is, sustained, and the said motion otherwise be overruled, and that it is further considered, ordered, adjudged, and decreed by the court that the judgment of the court below be made the judgment of this court and entered against appellant and the sureties on her appeal bond in this No. 847.

Wherefore it is considered, ordered, and adjudged by the court that appellee, Justo R. Armijo, do have and recover of the appellant, Barbara Chaves de Armijo, and Mariano S. Otero, Juan C. Armijo, and Eloisa Armijo, sureties on her supersedeas bond, the sum of six thousand six hundred and sixteen ($6,616.24) dollars and twenty-four cents *a* and interest, at the rate of six per cent. per annum, from date until paid, together with all costs incurred in the court whence this cause came into this court, amounting to two hundred
202 and forty-one ($241.00) dollars, and the costs of this court, to be taxed, and that he may have execution therefor.

And afterwards, to wit, on the 20th day of January, A. D. 1900, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a motion for rehearing; which said motion for rehearing was and is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1900.

BARBARA CHAVES DE ARMIJO, Plaintiff in Error,
vs.
JUSTO R. ARMIJO, Defendant in Error.

No. 840. (No. 847, Appeal.)

Barbara Chaves de Armijo, the plaintiff in error in the above-entitled cause, respectfully moves the court for a rehearing on the judgment, decision, and order entered in this court in this cause on, to wit, January 17th, A. D. 1900, and for grounds of this motion shows unto the court the following causes, viz:

The following questions, decisive of said cause and duly sub-

mitted by counsel for plaintiff in error, have been overlooked by this honorable court:

1.

In sustaining the respective motions of defendant in error and appellee to affirm the judgment below, this court overlooked the following error duly assigned herein:

8. The court erred in overruling the motion of appellant and plaintiff in error for entry of an order granting an appeal herein (Transcript, p. 192).

203 The supersedeas appeal bond approved and signed by his honor the judge of the district court below on October 4, 1892, expressly recites the appeal prayed by said defendant, Barbara Chaves de Armijo, from the judgment below to this court (p. 188), and this court overruled the recital of said fact in sustaining the motion of defendant in error upon said ground.

2.

This court in affirming the judgment below overlooked the fact, shown by the record herein, that in the district court below due written objections and exceptions were filed in due time by the defendant below and argued and submitted to said district court, and that therefore, under the rules and practice in such cases provided, a motion for a new trial was not required or necessary, and such motion upon said facts would have been a reflection upon the court below.

3.

This court overlooked the assignment of errors No. 3, as follows: "The court and referee erred in admitting evidence of value of the alleged services of plaintiff below" (Record, p. 37).

The record distinctly shows that plaintiff below himself testified that his services were rendered under a written agreement between the parties (p. 36, Record), and that said agreement had been written and signed upon p. 988 of the latter-press copy book offered in evidence (Record, p. 47), and that said page containing such alleged written agreement had been removed from said book and was lost.

Upon the facts testified to by plaintiff, we submit that while evidence of the contents of the lost paper might have been admissible in evidence, it was clearly an error decisive of this cause to permit a recovery upon testimony of plaintiff to the value of such alleged services upon a *quantum meruit* as reported by the referee and entered by the court.

204 Wherefore your petitioner prays that she may be granted a rehearing of this cause; and she will ever pray, &c.

WARREN & CHAVES,
Attorneys for Plaintiff in Error.

I hereby acknowledge service of a copy of the foregoing this 19th day of Jan'y, 1900.

NEILL B. FIELD,
Att'y for Def't in Error.

And afterwards, to wit, on the nineteenth day of said regular term, the same being Wednesday, the 24th day of January, A. D. 1900, the following, among other, proceedings were had, as follows, to wit:

BARBARA CHAVES DE ARMIJO, Plaintiff in Error and Appellant,
vs.
JUSTO R. ARMIJO, Defendant in Error and Appellant.
} Nos. 840–'7. Error to and Appeal from District Court, Bernalillo County.

This cause having come before the court upon a motion for a rehearing in the above-entitled causes, the court, having had the same under advisement and being now sufficiently advised in the premises, overrules said motion. It is therefore considered and adjudged by the court that the motion for rehearing by appellant and plaintiff in error be, and the same hereby is, overruled.

And afterwards, to wit, on the 25th day of January, A. D. 1900, there was filed in the office of the clerk of the said supreme court a motion for an appeal to the Supreme Court of the United States; which said motion for an appeal to the Supreme Court of the United States is in words and figures as follows, to wit:

205 In the Supreme Court of the Territory of New Mexico, January Term, 1900.

BARBARA CHAVES DE ARMIJO, Appellant,
vs.
JUSTO R. ARMIJO, Appellee.
} No. 847. Appeal from District Court, Bernalillo Co.

BARBARA CHAVES DE ARMIJO, Plaintiff in Error,
vs.
JUSTO R. ARMIJO, Defendant in Error.
} No. 840. Error to District Court, Bernalillo County.

Now comes the plaintiff in error and appellant, Barbara Chaves de Armijo, by H. L. Warren and H. B. Fergusson, her attorneys, and prays to the court to grant her an appeal from the judgment and decision of this honorable court in these cases to the Supreme Court of the United States, and that the execution heretofore issued out of this court against said plaintiff in error and appellant be recalled and further execution herein stayed upon the filing and approval by this court by said plaintiff in error and appellant of a supersedeas bond, as required by law; and she will ever pray.

H. L. WARREN,
H. B. FERGUSSON,
Attorneys for Plaintiff in Error and Appellant.

And afterwards, to wit, on the twenty-first day of said regular term, the same being Friday, the 26th day of January, the following, among other, proceedings were had as follows, to wit:

206 BARBARA CHAVES DE ARMIJO, Plaintiff in Error & Appellant,
vs.
JUSTO R. ARMIJO, Defendant in Error & Appellee.
} Nos. 840–'7. Appeal from and Error to District Court, Bernalillo County.

This cause coming on to be heard upon the application and prayer of the plaintiff in error and appellant for the granting of an appeal herein from the judgment and decision of this court to the Supreme Court of the United States and for an order recalling the execution heretofore issued herein pending such appeal, and the court having duly considered such application and prayer, it is therefore ordered and adjudged by the court that such application and prayer be granted, and on the filing of a supersedeas bond, duly approved by the court, in the sum of double the amount of the judgment rendered herein, it is ordered and considered by the court that the execution heretofore issued in said cause is ordered to be recalled and further execution stayed pending such appeal.

And afterwards, to wit, on the 30th day of January, there was filed in the office of the said clerk of the said supreme court a supersedeas bond; which said supersedeas bond is in words and figures as follows, to wit:

Know all men by these presents that we, Barbara Chaves de Armijo, as principal, and Frank A. Hubbell, Juan C. Armijo, and —— ——, as sureties, are held and firmly bound unto Justo R. Armijo in the full sum of fourteen thousand ($14,000) dollars, to be paid to the said Justo R. Armijo, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of January, in the year of *of* Lord one thousand nine hundred (1900).

Whereas lately, at a session of the supreme court of the Territory of New Mexico, in a suit pending in said court between Barbara Chaves de Armijo, plaintiff in error, *vs.* Justo R. Armijo, de-
207 fendant in error, a final judgment was rendered against the said Barbara Chaves de Armijo, and the said Barbara Chaves de Armijo having obtained the allowance of an appeal to the Supreme Court of the United States of America:

Now, the condition of the above obligation is such that if the said Barbara Chaves de Armijo shall prosecute said appeal to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

BARBARA CHAVEZ DE ARMIJO. [SEAL.]
FRANK A. HUBBELL. [SEAL.]
JUAN C. ARMIJO. [SEAL.]

Sealed and delivered in presence of—
S. B. GILLETT.

Approved to operate as a supersedeas by—

WILLIAM J. MILLS,
Chief Justice of the Supreme Court of the Territory of New Mexico.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

This day personally appeared before me, the undersigned authority, a notary public in and for Bernalillo county, New Mexico, Barbara Chaves de Armijo, principal in the above undertaking, and Frank A. Hubbell, Juan C. Armijo, and —— ——, sureties on the above bond, and each of said sureties, being by me severally sworn, says that he is worth the sum of fourteen thousand ($14,000) dollars in property situate in the Territory of New Mexico over and above his just debts and liabilities that is subject to execution under the laws of said Territory, and all of said parties acknowledged to me that they signed said bond as their free act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office in Albuquerque, New Mexico, this 26th day of January, A. D. 1900.

FELIX H. LESTER,
Notary Public.

[SEAL.]

My commission expires Nov. 3rd, 1902.

208 And afterwards, to wit, there was filed, on the second day of February, in the office of the said clerk of the supreme court, a statement of facts; which said statements of facts by the court is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, January Term, 1900.

BARBARA CHAVES DE ARMIJO, Appellant, } No. 840–'7. Appeal from
vs. } Dist. Court, Bernalillo
JUSTO R. ARMIJO, Appellee. } Co.

Application having been made to the court to find the facts in this cause in accordance with the requirements of the act of Congress, it is ordered to be certified to the Supreme Court of the United States that this court, for reasons disclosed by the judgment, is unable to find the facts, the appeal not having been perfected in such manner as to bring the facts of the case into this court.

WILLIAM J. MILLS,
Chief Justice, etc.

To the above and foregoing purported statement of facts the said appellant excepted *and* at the time and still excepts.

WILLIAM J. MILLS,
Chief Justice, etc.

209 TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé, }

Supreme Court.

I, the undersigned, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing 208 pages contain a full and complete transcript of the records and proceedings, pleadings, and statement of facts filed in the above-entitled cause which is transmitted to the Supreme Court of the United States, in accordance with an appeal herein granted by the supreme court of the Territory of New Mexico.

Witness my hand and the seal of the supreme court of the Territory of New Mexico this 22nd day of March, A. D. 1900.

[Seal Supreme Court, Territory of New Mexico.]

JOSE D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

210 UNITED STATES OF AMERICA, ss:

To Justo R. Armijo, Greeting:

You are hereby commanded, cited, and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to an appeal taken from the supreme court of the Territory of New Mexico, wherein Barbara Chaves de Armijo was plaintiff in error and appellant and you were defendant in error and appellee, to show cause, if any there be, why the judgment rendered against said appellant and plaintiff in error, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Seal Supreme Court, Territory of New Mexico.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of March, in the year of our Lord one thousand nine hundred.

WILLIAM J. MILLS,
Chief Justice of the Supreme Court of the Territory of New Mexico.

On this 27 day of March, in the year of our Lord one thousand nine hundred, personally appeared S. B. Gillett before me, the subscribed notary public, and makes oath that he delivered a true copy of the within citation to Justo R. Armijo.

S. B. GILLETT.

Sworn to and subscribed the 27 day of March, A. D. 1900.

[Seal of Felix H. Lester, Notary Public, Bernalillo Co., N. M.]

FELIX H. LESTER,
Notary Public.

211 In the Supreme Court of the United States.

BARBARA CHAVES DE ARMIJO, Appellant,
vs.
JUSTO R. ARMIJO, Appellee.

Appeal from the supreme court of the Territory of New Mexico.

Assignment of Errors.

The said supreme court of the Territory of New Mexico erred in the following particulars:

1. The court erred in dismissing the appeal and writ of error of the appellant herein from the district court of the second judicial district of said Territory, on motion of the appellee, without hearing this cause on the merits.

2. The court erred in dismissing said appeal and writ of error, on the motion of appellee, and affirming the judgment of the said district court for the reasons set out in said motion.

3. The court erred in dismissing said appeal and writ of error and affirming the judgment of the said district court for the reasons set forth by the court in its said action and decision.

4. The court erred in dismissing said appeal and writ of error and affirming the judgment of said district court for the reason that the transcript of the record showed that a motion for a new trial had not been filed in said district court.

5. The court erred in refusing to make findings of fact on which it based its action in dismissing said appeal and writ of error.

6. The court erred in inspecting the transcript of the record in this cause for the purpose of ascertaining that a motion for a new trial had not been filed in said cause, and at the same time refusing to inspect said transcript to consider and adjudge the whole case on its merits.

212 Wherefore this appellant humbly prays this honorable court that the action and decision of said supreme court of the Territory of New Mexico may be reversed and this cause remanded, with such instructions as may be meet and proper.

H. L. WARREN,
Attorney for Appellant.

[Endorsed:] 840–847. Supreme Court of the United States. Barbara Chaves de Armijo, appellant, *vs.* Justo R. Armijo, appellee. Assignment of errors. H. L. Warren, att'y for appellant.

Endorsed on cover: File No., 17,706. New Mexico Territory supreme court. Term No., 243. Barbara Chavez de Armijo, appellant, *vs.* Justo R. Armijo. Filed April 6th, 1900.

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 245.

BARBARA CHAVES DE ARAUJO, APPELLANT,

vs.

JESUS M. ARAUJO.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

FILED JUNE 4, 1900.

(17,706.)

24936

(17,706.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1900.

No. 243.

BARBARA CHAVEZ DE ARMIJO, APPELLANT,

vs.

JUSTO R. ARMIJO.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 Be it remembered that heretofore, on the fourteenth day of December, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of record; which said transcript of record is in words and figures as follows, to wit:

2 In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1900.

BARBARA CHAVEZ DE ARMIJO, Plaintiff in Error,
vs.
JUSTO R. ARMIJO, Defendant in Error. } No. 840.

Error to district court, Bernalillo county.

Filed in my office this Nov. 21, 1899. JOSE D. SENA, *Clerk.*

WARREN & FERGUSSON,
WARREN & CHAVEZ,
Attorneys for Plaintiff in Error.

Filed in my office this Dec. 14, 1899. JOSE D. SENA, *Clerk.*

3 Be it remembered that heretofore, to wit, on the 13th day of February, 1897, there was filed in the office of the clerk of the district court of the second judicial district of the Territory of New Mexico within and for the county of Bernalillo plaintiff's declaration; which said declaration is in words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
Bernalillo County. }

In the District Court, Second Judicial District of the Territory of New Mexico, Sitting within and for the County of Bernalillo, in said District, for the Trial of Causes Arising under the Laws of said Territory, at the March Term, A. D. 1897.

To the Honorable Needham C. Collier, associate justice of the supreme court *in* the Territory of New Mexico and judge of the second judicial district court thereof:

Your petitioner, Justo R. Armijo, a resident of the county of Bernalillo and Territory of New Mexico, complains of Barbara Chavez de Armijo, who is likewise a resident of the same county and Territory, in an action of assumpsit, for that whereas heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and ninety-seven, at, to wit, the county of Bernalillo aforesaid, the said defendant was justly indebted to the plaintiff in the sum of $9,434.44 for the work and labor, care and diligence, of the said plaintiff by the said plaintiff before that time

done, performed, and bestowed in and about the business of
4 said defendant and for the said defendant and at her special instance and request, and in the further sum of $9,434.44 for interest accrued upon divers sums of money before that time due and owing from the said defendant to the said plaintiff and by the said plaintiff to the said defendant forborne for long spaces of time at the special instance and request of the said defendant, and in the further sum of $9,434.44 for money by the said plaintiff lent to the said defendant at her special instance and request, and in the further sum of $9,434.44 for money by the said plaintiff advanced to and paid, laid out, and expended for the said defendant at her like special instance and request, and in the further sum of $9,434.44 for money of the said plaintiff before that time had and received by the said defendant; and, being so indebted, she, the said defendant, then and there faithfully promised the said plaintiff to pay him the said several sums of money when she, the said defendant, should be thereunto afterwards requested.

And for that whereas the said defendant heretofore, to wit, on the first day of January, in the year of our Lord one thousand eight hundred and ninety-seven, the said defendant accounted with the said plaintiff of and concerning divers other sums of money from the said defendant to the said plaintiff then and there due and owing and then in arrears and unpaid, and upon such accounting the said defendant was then and there found to be in arrear and indebted to the said plaintiff in the further sum of $9,434.44 of like lawful money, and, being so found in arrear and indebted, she, the said defendant, undertook and then and there faithfully promised the said plaintiff to pay him the said sum of money when she should be afterwards thereunto requested.

5 And the said defendant, not regarding her several promises and undertakings, hath not as yet paid the said several sums of money, any or either of them or any part thereof, though often requested so to do, but to pay him the same has hitherto neglected and refused and so doth neglect and refuse, to the damage of the said plaintiff in the sum of $10,000.

Plaintiff files herewith and makes a part of this declaration a bill of particulars of his said claims and makes the same Exhibit "A." Wherefore plaintiff brings this suit and prays judgment against the said defendant for said sum of $10,000, his damages, together with interest and costs of suit.

NEILL B. FIELD,
Attorney for Plaintiff.

Barbar- Chavez de Armijo to J. R. Armijo, Dr.

1897.		
Jan. 1.	To 5 years service as manager, at $2,500 a year..	$12,500.00
	To balance due me, as per manifest in your possession, for moneys advanced.....	3,717.65
	To interest on monthly balances of cash.....	290.12
		$16,507.77

CR.

By my note held by you, dated July 11, 1892.....	$6,000.00	
By interest on same, 4 yrs. 5 mos. and 20 days, at 4 per cent. per annum..	1,073	
		$7,073.33
Balance		$9,434.44

(Endorsed: Filed in my office this Feb. 13, 1897. O. N. Marron, clerk.)

6 And thereafter, on, to wit, the 4th day of March, 1897, there was filed in the office of the clerk of said court in said cause defendant's pleas; which said pleas are in words and figures following, to wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo.

In the Second Judicial District Court.

JUSTO R. ARMIJO
vs.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

Now comes the defendant, Barbara Chavez de Armijo, by Warren, Fergusson and Gillett, her attorneys, and defends the wrong and injury, when, etc., and says that she did not promise or undertake in manner and form as the said plaintiff hath above thereof complained against her; and of this she puts herself upon the country.

WARREN, FERGUSSON & GILLETT,
Attorneys for Defendant.

TERRITORY OF NEW MEXICO,
County of Bernalillo.

In the Second Judicial District Court.

JUSTO R. ARMIJO
vs.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

And for a further plea in this behalf the said defendant says that the said plaintiff ought not to have or maintain his aforesaid action against her, the said defendant, because she says that the said plaintiff, before and at the time of the commencement of this suit, to wit, at the county of Bernalillo aforesaid, was and still is indebted to the said defendant in a large sum of money, to wit, the sum of fourteen thousand ($14,000) dollars, for work and labor, care and diligence, of the said defendant by the said defendant before that time done, performed, and bestowed in and about the business of the said plaintiff and for the said plaintiff and at his request,

and for divers materials and other necessary things by
7 the said defendant before that time found and provided and used and applied in and about the said work and labor for the said plaintiff and at his like request, and for divers goods, wares, and merchandise sold and delivered by the said defendant to the *the* said plaintiff at his like request, and for money by the said defendant before that time lent and advanced to, paid, laid out, and expended for the said plaintiff and at his like request, and for money by the said plaintiff before that time had and received to and for the use of the said defendant, and for money due and owing from the said plaintiff for interest upon and for the forbearances of divers sums of money due and owing from the said plaintiff to the said defendant and by the said defendant foreborne to the said plaintiff for divers long spaces of time before then elapsed, and for money due and owing from the said plaintiff to the said defendant upon an account stated between them; which said sums of money so due and owing to the said defendant, as aforesaid, exceeds the damages sustained by the said plaintiff by reason of non-performance by the said defendant of the said several supposed promises and undertakings in said declaration mentioned, and out of which said sums of money so due and owing from the said plaintiff to the said defendant the said defendant is ready and willing and hereby offers to set off and allow to the said plaintiff the full amount of damages, according to the form of statute in such case made and provided; and this the defendant is ready to verify. Wherefore she prays judgment whether the said plaintiff ought to have or maintain his aforesaid action against her, the said defendant.

WARREN, FERGUSSON & GILLETT,
Attorneys for Defendant.

8 (Endorsed: Filed in my office this Mar. 4, 1897. O. N. Marron, clerk.)

And thereafter, on, to wit, the 5th day of March, 1897, there was filed in the office of the clerk of said court in said cause plaintiff's replications; which said replications are in words and figures following, to wit:

TERRITORY OF NEW MEXICO:

Bernalillo District Court, March Term, 1897.

JUSTO R. ARMIJO
vs.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

And the said plaintiff, as to the plea of the said defendant by her firstly above pleaded and of which she hath put herself upon the country, doth the like.

NEILL B. FIELD,
Attorney for Plaintiff.

And the said plaintiff, as to the plea of the said defendant by her secondly above pleaded, says that he did not undertake or promise in manner and form as the said defendant hath above thereof complained against him; and this the said plaintiff prays may be inquired of by the country.

NEILL B. FIELD,
Attorney for Plaintiff.

(Endorsed: Filed in my office this Mar. 5, 1897. O. N. Marron, clerk.)

And thereafter, on, to wit, the 20th day of April, 1898, there was filed in the office of the clerk of said court in said cause motion for reference; which said motion is in words and figures following, to wit:

TERRITORY OF NEW MEXICO,
County of Bernalillo.

In Second Judicial District Court.

9 JUSTO ARMIJO
vs.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

Now comes the defendant herein, by Warren, Fergusson and Gillette, her attorneys, and asks that the court refer this cause to a referee, and for grounds of this motion show- here to the court the following:

First. That it is apparent from the pleadings and motions in this cause that the matters involved in this cause will necessitate the examination of long and voluminous book accounts.

Second. That this is a proper case in which to make a reference to a referee.

Third. That under the code in force in this Territory the defendant is entitled to have this case referred to a referee.

And for many other good and sufficient reasons.

WARREN, FERGUSSON & GILLETT,
Attorneys for Defendant.

(Endorsed: Filed in my office this Apr. 20, 1898. Harry P. Owen, clerk.)

And thereafter, at a regular term of the district court of the second judicial district of the Territory of New Mexico, begun and held within and for the county of Bernalillo, on the thirty-ninth day of said term, the same being the 20th day of April, A. D. 1898, the following, among other, proceedings were had and entered of record:

Present: The Honorable Jonathan W. Crumpacker, associate justice of the supreme court of the Territory of New Mexico and judge of the second judicial district court thereof.

JUSTO R. ARMIJO
vs.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

10 This cause is this day heard upon defendant's motion for a reference of this cause to a referee, which motion is resisted by the plaintiff on the ground that plaintiff is thereby denied the right of trial by jury; and, the court being duly advised—

It is considered and ordered by the court that said motion for a reference be, and it is hereby, granted.

And it is further ordered that this cause be, and it is hereby, referred to Wm. D. Lee, as referee, to take the proofs of the plaintiff herein, and that said referee, to whom this cause is referred, report his findings of fact and conclusions of law in this cause with all possible speed.

And thereafter, on, to wit, the 18th day of August, 1898, there was filed in the office of the clerk of said court in said cause the referee's report; which said report is in words and figures following, to wit:

In the District Court, County of Bernalillo, Territory of New Mexico.

JUSTO R. ARMIJO
vs.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

Referee's Report.

To the Honorable J. W. Crumpacker, associate justice of the supreme court of the Territory of New Mexico and judge of said district court:

As referee in the above-entitled cause I do respectfully report:

That, having heretofore been appointed referee in the above-entitled cause, I caused said parties, together with their respective counsel and witnesses, in pursuance of due notice given in accordance with the statute, to appear before me in my office, in the city of Albuquerque, on the 5th day of May, 1898, and on a number of days thereafter, for the purpose of submitting their respective
11 proofs in the above-entitled cause; that a large amount of typewritten testimony was taken before me, comprising one hundred and sixty-one pages of such typewritten testimony, and a large number of exhibits were introduced in evidence and filed with me as referee, all of which testimony and exhibits are returned herewith as a part of my report.

Said case is an action in assumpsit on the common counts, wherein the plaintiff demands ten thousand dollars damages.

The defendant pleads non-assumpsit and a set-off for fourteen thousand dollars, also on the common counts, against the plaintiff.

The issues being thus formed, it would appear the controversy would be simply the correct balance between them; but the first question that arose was as to the existence of a contract claimed to have been entered into between the parties on the 20th day of June, 1892, by which the defendant had employed the plaintiff to work for her at an annual salary of $2,500.00 per year, which alleged contract was claimed to have been in writing, but had been lost. The existence of this contract was most emphatically denied by defendant, thus raising an issue of fact, the existence of which extended through many days, making a record of many pages of typewriting.

Plaintiff introduced what he claimed to be a copy of the contract, which reads as follows:

"Copy, April 25, 1898."

ALBUQUERQUE, N. MEX., *June* 25, 1892.

This agreement made on the date above written between us is: That from the first day of January, 1892, J. R. Armijo shall be paid for his services at the rate of ($2,500.00) two thousand five
12 hundred dollars per year.

J. R. ARMIJO.
MRS. N. T. ARMIJO.

(The above is a certified translation made by the court stenographer.)

If this contract should be admitted in evidence it would prove but one controverted question in the case, and that is as to the amount of plaintiff's compensation. The fact that plaintiff performed the services as set forth in the declaration is not denied, nor is the testimony of plaintiff as to the value of his services disputed by any other evidence in the case. Mr. Dickmann was asked as to the value of the services for collecting the rents for the N. T. Armijo building, which he said were five per cent., but does not pretend to say what the services of plaintiff were or the value thereof. The defendant herself does not claim to know, but testifies most positively that she does not know. On page 59 of the record, in answer to a question, she gives an unequivocal answer as follows:

Q. Mrs. Armijo, do you know what the services of J. R. Armijo were reasonably worth in acting for you as your agent during the period he was so engaged up to December 31st, 1896, for each year?

A. I don't know what the services were worth. They must have been like the services of all managers.

Q. Do you know, Mrs. Armigo, what services were performed by J. R. Armigo for you during these years before December 31st, 1896?

A. He collected my rents, attended to all my business, taxes and

all; collect the rents, pay the taxes every year, and pay my accounts every year.

Q. Do you know how much of his time was occupied to do that?

13 A. I do not.

The testimony of defendant shows that the employment of plaintiff was not confined to collecting rents of the Armijo building, while the testimony of plaintiff is to the effect that the entire charge and management of the whole estate was the services rendered.

There being no testimony offered on the part of the defendant in any way controverting the value plaintiff sets upon his services, the admission of the contract becomes immaterial, and it would have no effect on the result of the case. Plaintiff testifies that his services were worth twenty-five hundred dollars per annum, the same amount as which was claimed to be fixed in the alleged agreement, and, as there is no testimony controverting this value, the referee will have to take this amount as correct in summing up the case.

There is no dispute as to the period of services rendered by plaintiff for the defendant being five years, nor is there any question or dispute as to the amount of money claimed by plaintiff to have been advanced by him for the use of defendant, this amount being $3,717.65.

The defendant introduces under her set-off a note given by plaintiff for the sum of $6,000, made July 11th, 1892, with interest at four per cent. per annum; also a check for $3,824.48, cash that plaintiff received from defendant about the date of his employment and which defendant testifies and claims was paid plaintiff as an advance for services to be rendered in the future. There is no evidence on the part of plaintiff disputing the first of these items.

He admits giving the note, and says in his testimony that it
14 was for borrowed money. As to the second item, there is not sufficient proof to establish it as a gift from defendant to plaintiff, as claimed by him. Referee therefore finds that said plaintiff is properly chargeable with the amount of said item.

A statement of the account between them, as shown by the evidence, is as follows:

Am't claimed by Mrs. N. T. Armijo to have been paid to J. R. Armijo for future services	$3,824.48
Less salary for J. R. Armijo for year 1892	2,500.00
Jan. 1. 1893. Balance due Mrs. N. T. Armijo on money advanced	$1,324.48
Jan. 1, 1894. Note of J. R. Armijo to Mrs. Armijo, dated July 11, 1892	6,000.00
Jan. 1, 1894. Interest on above note from July 11, 1892, to January 1, 1894, at 4 per cent., 1 yr. 5 mos. and 20 days	353.33
Jan. 1, 1894. Amount due Mrs. Armijo	$7,677.81
Less salary for J. R. Armijo for 1893	2,500.00
Amount due Mrs. Armijo Jan. 1, 1894	$5,177.81
Jan. 1, 1895. Inte. at 4 per cent., 1 yr	207.11
Jan. 1, 1895. Amount due Mrs. Armijo	$5,384.92
Less salary for J. R. Armijo for 1894	2,500.00
Amount due Mrs. Armijo Jan. 1, 1895	$2,884.92
Jan. 1, 1896. Int. at 4 per cent., 1 yr	115.39
Jan. 1, 1896. Amount due Mrs. Armijo	$3,000.31
Less salary J. R. Armijo for 1895	2,500.00
Amount due Mrs. Armijo Jan. 1, 1896	$500.31
15 Apr. 1, 1896. Three months' interest at 4 per cent	5.00
	$505.31
Apr. 1, 1896. Salary J. R. Armijo, 3 months	625.00
Balance due J. R. Armijo April 1, 1896	119.69
Dec. 31, 1896. Salary J. R. Armijo from April 1, 1896, to December 31st, 1896, 9 months	1,875.00
Balance due J. R. Armijo Jan. 1, 1897, on account of salary	$1,994.69
Amount advanced by J. R. Armijo for Mrs. Armijo	3,717.65
Total amount due J. R. Armijo Jan. 1, 1897	$5,712.34
Amount due J. R. Armijo July 1st, 1897, being six months from the date when Mr. Armijo severed his connection with the business of Mrs. Armijo, and being six months from the date of the last item in said account	$5,712.34
Interest from July 1st, 1897, to August 15th, 1898, 1 yr. 1 mo. and 15 days, at six per cent	385.58
	$6,097.92

In a running account such as this, where money is advanced by both sides and one party is in the employment of the other, no interest should be allowed on balances unless expressly agreed to, and can only be allowed six months from the date of the
16 last item. In summing up the account I find that there was due J. R. Armijo a balance of $5,712.34 on January 1st, 1897, and with interest six months from that date up to the present time, or date of this report, at six per cent., being one year 1 month and 15 days, amounts to $385.58. I therefore find that there is a balance due J. R. Armijo from Barbara Chavez de Armijo on the 15th day of August, 1898, of $6,097.92, and I respectfully recommend that a judgment be entered in favor of J. R. Armijo for that amount, together with costs.

In compliance with the statutes, I certify that testimony or proofs were introduced before me for full nine days, and that I have been occupied six days in examining the books, exhibits, and testimony and authorities in this cause, which are very voluminous, and in getting up my report as referee.

All of which is respectfully submitted.

WM. D. LEE, *Referee.*

In the District Court, County of Bernalillo, Territory of New Mexico.

JUSTO R. ARMIJO
vs.
BARBARA CHAVES DE ARMIJO.

TERRITORY OF NEW MEXICO,
County of Bernalillo.

I, William D. Lee, having been heretofore appointed referee in the above-entitled cause by said court, do solemnly swear that I will faithfully and fairly hear and examine the cause and make a just, impartial, and true report, according to the best of my understanding.

WM. D. LEE.

Subscribed and sworn to before me this 5th day of May, A. D. 1898.

HARRY F. LEE,
Notary Public.

(Endorsed: Filed in my office this August 18, 1898. Harry P. Owen, clerk.)

17 And thereafter, on, to wit, the 18th of August, A. D. 1898, there was filed in the office of the said clerk of said court the oral testimony taken before Hon. W. D. Lee, the referee in said cause; which said testimony is in words and figures following, to wit:

* * * * * * *

* * * * * * *

184 Mr. WARREN: That is the case of defendant.
Mr. FIELD: I have no further testimony.

And thereafter, on, to wit, the second day of September,
185 1898, there *was* filed in the office of the clerk of said court in said cause exceptions to referee's report and motion to set same aside; which said exceptions and motion are in words and figures following, to wit:

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

In the District Court, Second Judicial District.

JUSTO R. ARMIJO
vs.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

The defendant herein, Barbara Chavez de Armijo, comes and excepts to the report of W. D. Lee, Esq., referee herein, dated August 15th, 1898, and filed in the office of the clerk of said court on August 18, 1898, upon the grounds hereinafter specified, to wit:

First. For that the said referee erroneously reported that there was due to the said plaintiff from the said defendant on August 15th, 1898, a balance of $6,097.92, whereas the said referee should have reported a balance of a large amount due from the plaintiff to the defendant on said account.

Second. For that the said referee erroneously admitted in evidence secondary proof of the contents of the alleged contract between said parties purporting to have been copied upon page 988 of the letter-press copy book, marked Exhibit 1 for identification, over defendant's objection.

Third. For that the said referee erroneously admitted the paper-writing, Plaintiff's Exhibit 2, for identification, over defendant's objection.

Fourth. For that the said referee erroneously overruled the objections of the defendant to the admission and rejection of evidence upon the hearing, which objections appear noted in the report of the said referee, and each one of which objections and exceptions is hereby referred to and made part hereof as fully as if the same were incorporated herein.

186 Fifth. For that the findings of fact by said referee are against the evidence in said cause taken and reported by said referee.

Sixth. And for that the conclusions of law by said referee are insufficient and erroneous.

Seventh. For other errors prejudicial to the defendant and apparent upon the record and of said report.

Wherefore the defendant prays the court that the said report be set aside, and that the said cause be again referred, with proper instructions, to the referee.

WARREN & FERGUSSON,
Attorneys for Defendant.

Service of copy acknowledged this Sept. 2nd, 1898.

NEILL B. FIELD,
Per A. B. READING.

(Endorsed: Filed in my office this September 2nd, 1898. Harry P. Owen, clerk.)

And thereafter, on, to wit, the 15th day of September, 1898, there was an order duly made and entered and filed in said cause; which said order is in words and figures following, to wit:

TERRITORY OF NEW MEXICO:

Bernalillo District Court.

JUSTO R. ARMIJO, Plaintiff,
vs.
BARBARA C. DE ARMIJO, Defendant. } No. 4728.

Judgment.

This cause coming on to be heard upon the exceptions of the defendant to the report of Wm. D. Lee, referee herein, heretofore filed in this cause, and the court having seen the said exceptions and the said report, and having heard counsel for the said defendant
187 in support of the said exceptions, and being now sufficiently advised of and concerning the same—

It is considered, ordered, and adjudged by the court that the said exceptions be, and each of the same hereby is, overruled and denied, and that the report of the said referee be, and the same hereby is, in all things approved and confirmed.

It is further considered, ordered, and adjudged by the court that the findings of the said referee herein be, and the same are hereby, adopted as the findings of this court; and in pursuance thereof and in accordance therewith it is considered, ordered, and adjudged by the court that the plaintiff, Justo R. Armijo, do have and recover of and from the defendant, Barbara Chavez de Armijo, the sum of six thousand and ninety seven dollars and ninety-two cents ($6,097.92), with interest thereon, at the rate of six per cent. per annum, from the 15th day of August, 1898, until paid, together with his costs in this behalf expended, to be taxed, including the sum of one hundred and fifty dollars ($150.00) which is hereby allowed to the said referee for his compensation in the said cause, and the sum of sixty-nine and $\frac{75}{100}$ dollars ($69.75) which is hereby allowed for the services of the stenographer employed by the referee, by consent of the parties, in taking down and transcribing the testimony before the referee herein, not including the extra copies of the said testimony furnished by the stenographer to the respective parties in the cause, and that he have execution therefor.

And thereupon the defendant, by her attorney, gives notice of an appeal to the supreme court of the Territory of New Mexico.

(Signed) J. W. CRUMPACKER, *Judge.*

188 (Endorsed: Filed in my office this September 15th, 1898. Harry P. Owen, clerk.)

And thereafter, on, to wit, the 4th day of October, 1898, there was filed in the office of the clerk of said court in said cause a supersedeas bond; which said bond is in words and figures following, to wit:

Know all men by these presents that we, Barbara Chavez de Armijo, as principal, and Mariano S. Otero, Juan C. Armijo, Eloise Armijo, *are* sureties, all of the county of Bernalillo and Territory of New Mexico, are held and firmly bound unto Justo R. Armijo, of said county and Territory, in the penal sum of thirteen thousand ($13,000.00) dollars; for the payment whereof they respectively bind themselves and their respective *real* and respective representatives firmly by these presents.

The condition of the above obligation is such that whereas, on, to wit, September —, 1898, in the district court for the county of Bernalillo and Territory of New Mexico, judgment was rendered in a certain cause therein pending, wherein Justo R. Armijo is plaintiff and Barbara Chavez de Armijo is defendant, in favor of said plaintiff and against the said defendant, for the sum of six thousand and ninety-seven ($6,097.92) dollars and ninety-two cents, with interest thereon from August 15th, 1898; and whereas the above-bounden Barbara Chavez de Armijo, defendant in said action, has prayed an appeal

from said judgment to the supreme court of the Territory of New Mexico:

Now, therefore, the condition of the above obligation is such that if the said appellant, Barbara Chavez de Armijo, shall prosecute her said appeal from said judgment with due diligence in said
189 supreme court, and if said judgment appealed from shall be affirmed, or, if her said appeal shall be dismissed, said appellant shall pay the said judgment so rendered against her in said cause and all costs that may be adjudged against her in the said supreme court in said appeal, then the above obligation to be void; but otherwise the same shall remain in full force and effect.

In witness whereof said parties hereto have respectively hereunto set their hands and seals this October 3rd, 1898.

BARBARA CHAVEZ DE ARMIJO. [SEAL.]
MARIANO S. OTERO. [SEAL.]
JUAN C. ARMIJO. [SEAL.]
ELOISA ARMIJO. [SEAL.]

TERRITORY OF NEW MEXICO, } ss:
County of Bernalillo, }

Before me, the undersigned, notary public within and for said county and Territory, this day came Mariano S. Otero, Juan C. Armijo, and Eloisa Armijo, who are respectively known to me to be the identical persons who executed and whose names are subscribed to the foregoing appeal bond, and severally acknowledged, each for himself, that he executed the said bond for the purposes therein mentioned.

And the said Mariano S. Otero, being by me duly sworn, says that he is worth the sum of thirteen thousand dollars in property situated in said county and Territory over and above his just debts and liabilities and subject to execution therein.

And the said Juan C. Armijo, being by me duly sworn, says that he is worth the sum of three thousand dollars in property situated in said county and Territory and subject to execution therein over and above all his just debts and liabilities.

And the said Eloisa Armijo, being by me duly sworn, says
190 that she is worth the sum of three thousand dollars in property situated in said county and Territory and subject to execution therein over and above all her just debts and liabilities.

In witness whereof I have hereunto set my hand and affixed my notarial seal this October 3rd, 1898.

[NOTARIAL SEAL.] H. LOCKHART, JR.,
Notary Public.

Approved by me this 3rd day of October, 1898.

J. W. CRUMPACKER, *Judge.*

Done at chambers October 3rd, 1898.

(Endorsed: Filed in my office this October 4th, 1898. Harry P. Owen, clerk.)

And thereafter, on, to wit, the 13th day of July, 1899, there was filed in the office of the clerk of said court in said cause a motion; which said motion is in words and figures following, to wit:

In the District Court, County of Bernalillo, Territory of New Mexico.

JUSTO R. ARMIJO, Plaintiff,
vs.
BARBARA CHAVEZ DE ARMIJO, Defendant. } No. 4728.

The defendant moves the court for an order directing the clerk of this court to enter an order granting an appeal from the final judgment herein as of date of October 4th, 1898, and for ground of this motion states that on said date an appeal was taken by the said defendant, and allowed by the court, to the supreme court of this Territory, and the appeal bond of said defendant was approved and filed on said date, and the taking of said appeal does not
191 sufficiently appear upon the record or minutes of the court.

WARREN & FERGUSSON,
Defendant's Attorneys.

H. L. Warren, being duly sworn, says he is one of the attorneys for defendant in said cause, and that he knows the contents of the above motion, and that the facts therein stated are true, to the best of his knowledge and belief.

H. L. WARREN.

Subscribed and sworn to before me this July 13th, 1899.

[NOTARIAL SEAL.] JUSTO L. ARMIJO,
Notary Public.

To said plaintiff and Hon. N. B. Field, his attorney:

You are hereby respectively notified that the defendant will call up the motion, a copy of which is attached hereto, on the 19th day of July, 1899, before Hon. J. W. Crumpacker, judge of said district court, for the county of Bernalillo, at the court-house at Albu-

querque, N. M., at ten o'clock a. m. of said day or as soon thereafter as counsel can be heard.

WARREN & FERGUSSON,
Attorneys for Defendant.

Copy served by delivery of same at the office of plaintiff's attorney, Hon. N. B. Field, to Mr. Ralph Hunt, his clerk, on this July 13th, 1899.

H. L. WARREN.

(Endorsed: Filed in my office this July 13th, 1899. Harry P. Owen, clerk.)

And thereafter, on, to wit, the 20th day of July, 1899, there was an order duly made by the court in said cause, and filed and entered of record in the office of the clerk of said court; which said order is in words and figures following, to wit:

192 JUSTO R. ARMIJO *vs.* BARBARA CHAVEZ DE ARMIJO. } No. 4728.

The motion of defendant filed herein on July 13th, 1899, for an order directing the clerk to enter upon the minutes an order granting an appeal from the final judgment herein as of the date of October 4th, 1898, for the reason that, as claimed by the defendant, that such appeal was taken and allowed, and a supersedeas bond was then approved and filed, having come on to be heard and having been argued by counsel and submitted to the court, the said motion is overruled and denied by the court; to which order and ruling of the court the defendant, by her attorneys, then and there duly excepted and now excepts.

(Signed) J. W. CRUMPACKER, *Judge.*

(Endorsed: Filed in my office this July 20, 1899. Harry P. Owen, clerk.)

And thereafter, on, to wit, the 15th day of September, 1899, there was lodged in the office of said clerk of said court a writ of error; which said writ is hereto attached and is in words and figures following, to wit:

Territory of New Mexico to the district court of the 2nd judicial district of the Territory of New Mexico, sitting within and for the county of Bernalillo, Greeting:

Because in the record and proceedings and in the rendition of judgment in a certain cause lately pending before you, wherein Justo R. Armijo was plaintiff and Barbara Chavez de Armijo was

defendant, error has intervened, as it is said, to the damage
193 of the said Barbara Chavez de Armijo, and we, being willing that such error, if any there be, should be corrected and speedy justice done in that behalf, do command you, if judgment therein be given, that then, under your seal, distinctly and openly, you send a copy of the record and proceedings aforesaid to the supreme court of the Territory of New Mexico, together with this writ, so that you have the same in the said supreme court on the first day of the next term thereof, to be begun and held on the first Wednesday after the first Monday in January, A. D. 1900, at Santa Fé, in said Territory, in pursuance of law.

Witness the Honorable William J. Mills, chief justice of the supreme court of the Territory of New Mexico, and the seal of the said court, this 14th day of September, A. D. 1898.

JOSE DE SENA, *Clerk.*

[SEAL.]

And thereafter, on, to wit, the 20th day of October, 1899, there was filed in the office of the clerk of said court in said cause a præcipe for transcript; which said præcipe is in words and figures following, to wit:

In the District Court of the Second Judicial District of the Territory of New Mexico.

JUSTO R. ARMIJO
vs.
BARBARA C. DE ARMIJO. } No. 4728.

To Harry P. Owen, clerk:

You will please make out a transcript to be used in the above cause on appeal of the following:

1. Declaration.
2. Defendant's pleas.
3. Replication.
4. Order of reference.
5. Report of referee and oral testimony taken before referee.
194 6. Exceptions to referee's report and motion.
7. Final decree.
8. Supersedeas appeal bond and approval thereof.
9. Motion of defendant for entry of appeal.
10. Order overruling same.
11. This præcipe.

WARREN & FERGUSSON,
Attorneys for Defendant.

(Endorsed: Filed in my office this 20th day of October, 1899. Harry P. Owen, clerk.)

I, Harry P. Owen, clerk of the district court of the second judicial district of the Territory of New Mexico within and for the county of Bernalillo, in accordance with the command contained in the foregoing writ of error, make return thereto by sending to the supreme court of the Territory of New Mexico the foregoing, which I hereby certify to be a true, correct, and complete transcript of so much of the record and proceedings had in that certain cause lately pending in the district court for the county of Bernalillo, wherein Justo R. Armijo was plaintiff and Barbara Chavez de Armijo was defendant, as was ordered to be certified by the defendant in error, Barbara Chavez de Armijo, in said cause, as the same appears of record and on file in my said office.

In witness whereof I have hereunto set my hand and affixed the seal of said court on this 2nd day of November, A. D. 1899.

[SEAL.] HARRY P. OWEN, *Clerk.*

Inasmuch, therefore, as the evidence introduced on the trial
195 of said cause and the rulings of the court and exceptions taken to such rulings upon the introduction of such evidence are not matters of record in said cause, the said defendant, Barbara Chavez de Armijo, pray- that this *their* bill of exceptions, containing such evidence and exceptions, may be signed, sealed, and made a part of the record in said cause, which is done accordingly this — day of November, A. D. 1899.

——— ———,

Associate Justice of the Supreme Court of the Territory of New Mexico and Judge in and for the Second Judicial District for Bernalillo County.

195 Now, on this 18th day of November, A. D. 1899, comes the defendant, by her attorneys, and presents to the court the foregoing bill of exceptions to be by the court sealed, signed, and settled as such, notice thereof having been duly given to plaintiff, he being present by counsel; but the court declines and refuses to so sign, seal, and settle the same; whereupon defendant excepts to the action of the court.

J. W. CRUMPACKER, *Judge.*

196 And afterwards, to wit, on the 14th day of December, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an assignment of errors; which said assignment of errors was and is in words and figures as follows, to wit:

Assignment of Errors.

Now comes the plaintiff in error, defendant below, and says that there is manifest error in the record and proceedings in said cause in the court below, in this, to wit:

1. The court erred in overruling the defendant's objections to the report of the referee and motion to set the same aside upon the grounds specified therein (Transcript of Record, pp. 185, 186).

2. The court and referee erred in admitting in evidence secondary evidence of the contents of the alleged copy of contracts between the parties, of which Complainant's Exhibit 2 is a copy (Record, p. 26 *et seq.*).

3. The court and referee erred in admitting evidence of value of the alleged services of plaintiff below (Record, p. 37 *et seq.*).

4. The court and referee erred in overruling the objections of the defendant below to evidence offered on the part of plaintiff below. (See pp. 47–91–117–135–170 *et seq.*, Transcript of Record.)

5. The court and referee erred in excluding competent evidence offered by defendant below. (See pp. 113 *et seq.*, Transcript of Record.)

6. The findings of fact by the referee, approved by the court below, are against the evidence.

7. The conclusions of law found by the referee and approved by the court are insufficient and erroneous.

8. The court erred in overruling the motion of plaintiff in error, the defendant below, for entry of an order granting an appeal herein (Transcript, p. 192).

9. Other errors apparent upon the face of the record.

WARREN & CHAVEZ,
Attorneys for Plaintiff in Error.

197 And afterwards, to wit, on the 23rd day of December, A. D. 1899, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a notice and motion to affirm judgment; which said notice and motion was and is in words as follows, to wit:

TERRITORY OF NEW MEXICO:

In the Supreme Court, January Term, A. D. 1900.

BARBARA CHAVES DE ARMIJO, Appellant,
vs.
JUSTO R. ARMIJO, Appellee. } No. 847.

BARBARA CHAVES DE ARMIJO, Plaintiff in Error,
vs.
JUSTO R. ARMIJO, Defendant in Error. } No. 840.

Notice of Motion.

To Barbara Chaves de Armijo, plaintiff in error and appellant, and to Messrs. Warren & Chavez, her attorneys:

You will please take notice that the undersigned, attorney for appellee and defendant in error in the above-entitled cause, will move the honorable the supreme court of the Territory of New Mexico, at Santa Fé, in said Territory, on the 3rd day of January, 1900, at the hour of ten o'clock a. m., or as soon thereafter as counsel can be heard, to strike from the transcript filed in each of the causes so much and such parts thereof as purpost to set forth the evidence adduced on the hearing of the cause sought to be reviewed,
198 and to affirm the judgment of the court below, and to enter judgment in this court against said appellant, and the sureties on her supersedeas bond in cause No. 847 for the amount of said judgment and interest, and ten per cent. damages, for the reasons set forth in the motion, a copy of which is hereto annexed; and you can appear and resist the said motion if you see fit to do so.

NEIL B. FIELD,
Attorney for Justo R. Armijo, Appellant and Defendant in Error.

Service of a copy of the foregoing notice, with copy of motion thereto attached, admitted this 23rd day of December, 1899.

WARREN & CHAVEZ,
Attorneys for Appellant and Plaintiff in Error.

TERRITORY OF NEW MEXICO:

In the Supreme Court, January Term, A. D. 1900.

BARBARA CHAVEZ DE ARMIJO, Appellant,
vs.
JUSTO R. ARMIJO, Appellee. } No. 847.

BARBARA CHAVEZ DE ARMIJO, Plaintiff in Error,
vs.
JUSTO R. ARMIJO, Defendant in Error. } No. 840.

Motion to Affirm Judgment.

Comes now Justo R. Armijo, appellee and defendant in error in the above-entitled cause, by Neil B. Field, his attorney, and moves the court to strike from the transcript filed in each of said causes so much and such part thereof as purports to set forth the evi-
199 dence adduced on the hearing of the cause sought to be reviewed and to affirm the judgment of the court below, and to enter judgment in this court against the appellant and the sureties on her supersedeas bond in cause No. 847 for the amount of said judgment and interest and for ten per cent. damages, for the following reasons:

I.

Because no question of law is properly reserved for determination by this court upon the record as made up.

II.

Because no motion for new trial was filed in the court below within ten days after the rendition of the judgment sought to be reviewed, as required by law.

III.

Because what purports to be the oral testimony taken before the referee in said cause is not authenticated as required by law, and is therefore not a part of the record.

IV.

Because if affirmatively appears from the transcript that the documentary evidence used before the referee was omitted from the transcript by direction of the attorneys for plaintiff in error and appellant, and the sufficiency of the evidence to support the findings and judgment cannot be reviewed if what purports to be the oral evidence were properly authenticated.

V.

Because the so-called assignment of errors is insufficient and does not require an examination of alleged errors at the hands of the court.

VI.

Because the so-called brief of appellant and plaintiff in error is in no sense a brief, but amounts to a mere evasion of the rules of the court requiring briefs to be filed.

VII.

200 Because the appeal and writ of error have operated to stay proceedings on the judgment of the district court and appear to have been taken and sued out merely for delay.

NEILL B. FIELD,
Attorney for Appellee and Plaintiff in Error.

And afterwards, to wit, — a regular term of the supreme court of the Territory of New Mexico begun and held at Santa Fé, the seat of government, on the first Wednesday after the first Monday in January, the same being the 3rd day of January, in the year of our Lord one thousand nine hundred, on the second day thereof, the same being Thursday, January 4th, A. D. 1900, the following, among other, proceedings were had, as follows, to wit:

BARBARA CHAVES DE ARMIJO, Plaintiff in Error, *vs.* JUSTO R. ARMIJO, Defendant in Error.	No. 840. Error to District Court, Bernalillo County.

This cause coming on to be heard upon the motion of the defendant in error for an affirmance of judgment, the same was argued by Neill B. Field, Esq., for defendant in error, and H. L. Warren, Esq., for plaintiff in error, and submitted to the court, and, the court not being sufficiently advised in the premises, takes the same under advisement.

BARBARA CHAVES DE ARMIJO, Appellant, *vs.* JUSTO R. ARMIJO, Appellee.	No. 847. Appeal from District Court, Bernalillo Co.

This cause coming on to be heard upon a motion of appellee for an affirmance of judgment, the same was argued by Neill B. Field, Esq., for appellee, and H. L. Warren, Esq., for appellant, and submitted to the court, and, the court not being sufficiently advised in the premises, takes the same under advisement.

201 And afterwards, to wit, on the twelfth day of said regular term, the same being Thursday, the 16th day of January, A. D. 1900, the following, among other, proceedings were had, as follows, to wit:

BARBARA CHAVES DE ARMIJO, Plaintiff in Error and Appellant, *vs.* JUSTO R. ARMIJO, Defendant in Error and Appellee.	Nos. 840–7. Error to and Appeal from District Court, Bernalillo County.

This cause having heretofore been heard on the motion of appellee and defendant in error to strike out portions of the transcript and to affirm the judgment of the court below, and to enter same against the appellant in No. 847, and the sureties on her supersedeas bond, with ten per cent. damages, and the court, having had the same under advisement and being now fully advised in the premises, it is considered, adjudged, and decreed by the court that the motion of the defendant in error and appellee to affirm the judgment of the court below on the ground that no motion for a new trial was filed in said cause, and to enter same against appellant and the sureties on her supersedeas bond be, and the same hereby is, sustained and the said motion otherwise be overruled; and that it is further considered, ordered, adjudged, and decreed by the court that the judgment of the court below be made the judgment of this court and entered against appellant and the sureties on her appeal bond in this No. 847.

Wherefore it is considered, ordered, and adjudged by the court that appellee, Justo R. Armijo, do have and recover of the appellant, Barbara Chaves de Armijo, and Mariano S. Otero, Juan C. Armijo, and Eloisa Armijo, sureties on her supersedeas bond, the sum of six thousand six hundred and sixteen ($6,616.24) dollars and twenty-four cents *a* and interest at the rate of six per cent. per annum from date until paid, together with all costs incurred in the court whence this cause came into this court, amounting to
202 two hundred and forty-one ($241.00) dollars, and the costs of this court, to be taxed, and that he may have execution therefor.

And afterwards, to wit, on the 20th day of January, A. D. 1900, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a motion for rehearing; which said motion for rehearing was and is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, January Term, A. D. 1900.

BARBARA CHAVES DE ARMIJO, Plaintiff in Error, *vs.* JUSTO R. ARMIJO, Defendant in Error.	No. 840 (No. 847, Appeal).

Barbara Chaves de Armijo, the plaintiff in error in the above-entitled cause, respectfully moves the court for a rehearing on the judgment, decision, and order entered in this court in this cause on,

to wit, January 17th, A. D. 1900, and for grounds of this motion shows unto the court the following causes, viz:

The following questions, decisive of said cause and duly submitted by counsel for plaintiff in error, have been overlooked by this honorable court:

1.

In sustaining the respective motions of defendant in error and appellee to affirm the judgment below, this court overlooked the following error, duly assigned herein:

8. The court erred in overruling the motion of appellant and plaintiff in error for entry of an order granting an appeal herein (Transcript, p. 192).

203 The supersedeas appeal bond approved and signed by his honor the judge of the district court below on October 4, 1892, expressly recites the appeal prayed by said defendant, Barbara Chaves de Armijo, from the judgment below to this court (p. 188), and this court overruled the recital of said fact in sustaining the motion of defendant in error upon said ground.

2.

This court, in affirming the judgment below, overlooked the fact, shown by the record herein, that in the district court below due written objections and exceptions were filed in due time by the defendant below and argued and submitted to said district court, and that therefore, under the rules and practice in such cases provided, a motion for a new trial was not required or necessary, and such motion upon said facts would have been a reflection upon the court below.

3.

This court overlooked the assignment of errors No. 3, as follows: "The court and referee erred in admitting evidence of value of the alleged services of plaintiff below" (Record, p. 37).

The record distinctly shows that plaintiff below himself testified that his services were rendered under a written agreement between the parties (p. 36, Record), and that said agreement had been written and signed upon p. 988 of the latter-press copy book offered in evidence (Record, p. 47), and that said page containing such alleged written agreement had been removed from said book and was lost.

Upon the facts testified to by plaintiff we submit that while evidence of the contents of the lost paper might have been admissible in evidence, it was clearly an error decisive of this cause to permit a recovery upon testimony of plaintiff to the value of such alleged services upon a *quantum meruit* as reported by the referee and entered by the court.

204 Wherefore your petitioner prays that she may be granted a rehearing of this cause; and she will ever pray, &c.

WARREN & CHAVES,
Attorneys for Plaintiff in Error.

I hereby acknowledge service of a copy of the foregoing this 19th day of Jan'y, 1900.

NEILL B. FIELD,
Att'y for Def't in Error.

And afterwards, to wit, on the nineteenth day of said regular term, the same being Wednesday, the 24th day of January, A. D. 1900, the following, among other, proceedings were had as follows, to wit:

BARBARA CHAVES DE ARMIJO, Plaintiff in Error and Appellant, *vs.* JUSTO R. ARMIJO, Defendant in Error and Appellant.	Nos. 840–7. Error to and Appeal from District Court, Bernalillo County.

This cause having come before the court upon a motion for a rehearing in the above-entitled causes, the court, having had the same under advisement and being now sufficiently advised in the premises, overrules said motion. It is therefore considered and adjudged by the court that the motion for rehearing by appellant and plaintiff in error be, and the same hereby is, overruled.

And afterwards, to wit, on the 25th day of January, A. D. 1900, there was filed in the office of the clerk of the said supreme court a motion for an appeal to the Supreme Court of the United States; which said motion for an appeal to the Supreme Court of the United States is in words and figures as follows, to wit:

205 In the Supreme Court of the Territory of New Mexico, January Term, 1900.

BARBARA CHAVES DE ARMIJO, Appellant, *vs.* JUSTO R. ARMIJO, Appellee.	No. 847. Appeal from District Court, Bernalillo Co.
BARBARA CHAVES DE ARMIJO, Plaintiff in Error, *vs.* JUSTO R. ARMIJO, Defendant in Error.	No. 840. Error to District Court, Bernalillo County.

Now comes the plaintiff in error and appellant, Barbara Chaves de Armijo, by H. L. Warren and H. B. Fergusson, her attorneys, and prays to the court to grant her an appeal from the judgment and decision of this honorable court in these cases to the Supreme Court of the United States, and that the execution heretofore issued out of this court against said plaintiff in error and appellant be recalled and further execution herein stayed upon the filing and approval

by this court by said plaintiff in error and appellant of a supersedeas bond, as required by law; and she will every pray.

H. L. WARREN,
H. B. FERGUSSON,
Attorneys for Plaintiff in Error and Appellant.

And afterwards, to wit, on the twenty-first day of said regular term, the same being Friday, the 26th day of January, the following, among other, proceedings were had, as follows, to wit:

206 BARBARA CHAVES DE ARMIJO, Plaintiff in Error & Appellant,
vs.
JUSTO R. ARMIJO, Defendant in Error & Appellee.
Nos. 840–7. Appeal from and Error to District Court, Bernalillo County.

This cause coming on to be heard upon the application and prayer of the plaintiff in error and appellant for the granting of an appeal herein from the judgment and decision of this court to the Supreme Court of the United States and for an order recalling the execution heretofore issued herein pending such appeal, and the court having duly considered such application and prayer, it is therefore ordered and adjudged by the court that such application and prayer be granted, and on the filing of a supersedeas bond, duly approved by the court, in the sum of double the amount of the judgment rendered herein it is ordered and considered by the court that the execution heretofore issued in said cause *is* ordered to be recalled and further execution stayed pending such appeal.

And afterwards, to wit, on the 30th day of January, there was filed in the office of the said clerk of the said supreme court a supersedeas bond; which said supersedeas bond is in words and figures as follows, to wit:

Know all men by these presents that we, Barbara Chaves de Armijo, as principal, and Frank A. Hubbell, Juan C. Armijo, and —— ——, as sureties, are held and firmly bound unto Justo R. Armijo in the full sum of fourteen thousand ($14,000) dollars, to be paid to the said Justo R. Armijo, his certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 26th day of January, in the year of *of* Lord one thousand nine hundred (1900).

Whereas lately, at a session of the supreme court of the Territory of New Mexico, in a suit pending in said court between Barbara Chaves de Armijo, plaintiff in error, *vs.* Justo R. Armijo, de-
207 fendant in error, a final judgment was rendered against the said Barbara Chaves de Armijo, and the said Barbara Chaves de Armijo having obtained the allowance of an appeal to the Supreme Court of the United States of America:

Now, the condition of the above obligation is such that if the said Barbara Chaves de Armijo shall prosecute said appeal to effect and answer all damages and costs if she fail to make her plea good, then the above obligation to be void; else to remain in full force and virtue.

BARBARA CHAVES DE ARMIJO. [SEAL.]
FRANK A. HUBBELL. [SEAL.]
JUAN C. ARMIJO. [SEAL.]

Sealed and delivered in presence of—
S. B. GILLETT.

Approved, to operate as a supersedeas, by—
WILLIAM J. MILLS,
Chief Justice of the Supreme Court of the Territory of New Mexico.

TERRITORY OF NEW MEXICO, }
County of Bernalillo. }

This day personally appeared before me, the undersigned authority, a notary public in and for Bernalillo county, New Mexico, Barbara Chaves de Armijo, principal in the above undertaking, and Frank A. Hubbell, Juan C. Armijo, and —— ——, sureties on the above bond, and each of said sureties, being by me severally sworn, says that he is worth the sum of fourteen thousand ($14,000) dollars in property situate in the Territory of New Mexico, over and above his just debts and liabilities, that is subject to execution under the laws of said Territory, and all of said parties acknowledged to me that they signed said bond as their free act and deed.

In witness whereof I have hereunto set my hand and affixed my official seal, at my office, in Albuquerque, New Mexico, this 26th day of January, A. D. 1900.

FELIX H. LESTER,
Notary Public.

[SEAL.]

My commission expires Nov. 3rd, 1902.

208 And afterwards, to wit, there was filed on the second day of February, in the office of the said clerk of the supreme court, a statement of facts; which said statements of facts by the court is in words and figures as follows, to wit:

In the Supreme Court of the Territory of New Mexico, January Term, 1900.

BARBARA CHAVES DE ARMIJO, Appellant, vs. JUSTO R. ARMIJO, Appellee. } No. 840–7. Appeal from Dist. Court, Bernalillo Co.

Application having been made to the court to find the facts in this cause in accordance with the requirements of the act of Congress, it is ordered to be certified to the Supreme Court of the United States that this court, for reasons disclosed by the judgment, is una-

ble to find the facts, the appeal not having been perfected in such manner as to bring the facts of the case into this court.

WILLIAM J. MILLS,
Chief Justice, etc.

To the above and foregoing purported statement of facts the said appellant excepted *and* at the time, and still excepts.

WILLIAM J. MILLS,
Chief Justice, etc.

209 TERRITORY OF NEW MEXICO, } ss:
County of Santa Fé,

Supreme Court.

I, the undersigned, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing 208 pages contain a full and complete transcript of the records and proceedings, pleadings, and statement of facts filed in the above-entitled cause, which is transmitted to the Supreme Court of the United States in accordance with an appeal herein granted by the supreme court of the Territory of New Mexico.

Witness my hand and the seal of the supreme court of the Territory of New Mexico this 22nd day of March, A. D. 1900.

[Seal of the Supreme Court, Territory of New Mexico.]

JOSE D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

210 UNITED STATES OF AMERICA, ss:

To Justo R. Armijo, Greeting:

You are hereby commanded, cited, and admonished to be and appear at a Supreme Court of the United States, at Washington, within sixty days from the date hereof, pursuant to an appeal taken from the supreme court of the Territory of New Mexico, wherein Barbara Chaves de Armijo was plaintiff in error and appellant and you were defendant in error and appellee, to show cause, if any there be, why the judgment rendered against said appellant and plaintiff in error, as in said appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 22nd day of March, in the year of our Lord one thousand nine hundred.

[Seal of the Supreme Court, Territory of New Mexico.]

WILLIAM J. MILLS,
Chief Justice of the Supreme Court of the Territory of New Mexico.

On this 27 day of March, in the year of our Lord one thousand nine hundred, personally appeared A. B. Gillett before me, the subscribed notary public, and *makes* oath that he delivered a true copy of the within citation to Justo R. Armijo.

S. B. GILLETT.

Sworn to and subscribed the 27 day of March, A. D. 1900.

[Seal of Felix H. Lester, Notary Public, Bernalillo Co., N. M.]

FELIX H. LESTER,
Notary Public.

211 In the Supreme Court of the United States.

BARBARA CHAVES DE ARMIJO, Appellant,
vs.
JUSTO R. ARMIJO, Appellee.

Appeal from the supreme court of the Territory of New Mexico.

Assignment of Errors.

The said supreme court of the Territory of New Mexico erred in the following particulars:

1. The court erred in dismissing the appeal and writ of error of the appellant herein from the district court of the second judicial district of said Territory, on motion of the appellee, without hearing this cause on the merits.

2. The court erred in dismissing said appeal and writ of error on the motion of appellee and affirming the judgment of the said district court for the reasons set out in said motion.

3. The court erred in dismissing said appeal and writ of error and affirming the judgment of the said district court for the reasons set forth by the court in its said action and decision.

4. The court erred in dismissing said appeal and writ of error and affirming the judgment of said district court, for the reason that the transcript of the record showed that a motion for a new trial had not been filed in said district court.

5. The court erred in refusing to make findings of fact on which it based its action in dismissing said appeal and writ of error.

6. The court erred in inspecting the transcript of the record in this cause for the purpose of ascertaining that a motion for a new trial had not been filed in said cause and at the same time refusing to inspect said transcript to consider and adjudge the whole case on its merits.

212 Wherefore this appellant humbly prays this honorable court that the action and decision of said supreme court of the Territory of New Mexico may be reversed and this cause remanded, with such instructions as may be meet and proper.

H. L. WARREN,
Attorney for Appellant.

(Endorsed:) 840, 847. Supreme Court of the United States. Barbara Chaves de Armijo, appellant, *vs.* Justo R. Armijo, appellee. Assignment of errors. H. L. Warren, att'y for appellant.

(Endorsed:) File No., 17,706. New Mexico Territory supreme court. Term No., 592. Barbara Chavez de Armijo, appellant, *vs.* Justo R. Armijo. Filed April 6th, 1900.

No. 243.
Def. of J. McGowan for Appellant.
Supreme Court of the United States.
OCTOBER TERM, 1900.
Filed Oct. 27, 1900.

Office Supreme Court U.S.
FILED
OCT 27 1900
JAMES H. MCKENNEY,
Clerk.

BARBARA CHAVEZ DE ARMIJO,
APPELLANT,
vs.
JUSTO R. ARMIJO, APPELLEE.
No. 243.

REPLY TO APPELLEE'S MOTION TO DISMISS OR AFFIRM.

J. H. McGOWAN,
For Appellant.

WASHINGTON, D. C.
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1900.

Supreme Court of the United States.

OCTOBER TERM, 1900.

BARBARA CHAVEZ DE ARMIJO,
APPELLANT,
v.
JUSTO R. ARMIJO.
No. 243.

Reply to Appellees' Motion to Dismiss or Affirm.

The motion to dismiss is asked on four grounds, first, that the appellant did not file the record of the case with this Court as required by section **1** of rule **9**; second, that the transcript is not made up in accordance with the requirements of section **2** of the Act of April 7, 1874 (18 Stats., 27), third, because the Supreme Court of the Territory of New Mexico refused to certify a statement of facts in the case in the nature of a special verdict, and, fourth, because the assignment of errors filed with the transcript raises no question which can be reviewed by this Court on this record.

I.

Referring to the first ground stated above, we observe that the appeal was allowed January 26, 1900, and the record duly filed in this Court April 6, 1900, both dates being within the October term, 1899. The notice of the motion to dismiss was not made until after the opening of the October term, 1900. This Court has frequently held that the transcript of record may be filed at any time pursuant to the rules of the Supreme Court succeeding the taking of the appeal or bringing the writ of error, if in the meantime the appellee or defendant in error has not taken advantage of the provision in paragraph **1** of rule **9** to have the cause docketed and dismissed. Green *v.* Elbert, 137 U. S. 615, and other decisions cited therein.

II.

In response to the allegation that the transcript is not made up in accordance with the requirements of section **2,** of said Act of April 7, 1874, relating to the jurisdiction of this Court over the matter of appeal, etc., from the Territorial Courts, it is to be said that the appellant complied with the statute as nearly as she could.

The record, only extracts of which have been printed, shows the case to be one of assumpsit, the declaration being on the common counts, the defendant (appellant here) pleading the general issue and giving notice of set-off. There was no disclosure in the declaration that the plaintiff claimed that a written contract existed between himself and the defendant. It was made apparent to the trial court that the case involved the examination of accounts between the parties, and upon motion of defendant it was referred to a referee to take proofs and report

back to the Court. Immediately in entering upon the examination of the witnesses, the plaintiff undertook to show that a written contract had been made between himself and the defendant, fixing a salary to run indefinitely at $2,500 a year, which salary was the principal item of the plaintiff's claim. Plaintiff testifies that there was but one copy of the written contract made, and that it had been delivered to him upon its execution, and he had lost it. He tendered in evidence an alleged copy, which he admitted was made from his memory only. The referee admitted this copy in evidence under objection, and it was marked as one of the exhibits in the case. He also admitted evidence tending to show the value of the services of the plaintiff upon the *quantum meruit*, all of which was objected to by defendant, and the objections duly noted by the referee, exceptions being taken at the same time to the rulings of the referee. Numerous other objections and exceptions appear throughout the testimony.

On the 18th of August, 1898, the report of the referee was filed in the Court, in the body of which the statement is made "that a large amount of typewritten testimony was taken before me, comprising 161 pages of such typewritten testimony, and a large number of exhibits were introduced in evidence and filed with me as referee, *all of which testimony and exhibits are returned herewith as a part of my report.*"

Upon the filing of this report, the defendant filed exceptions thereto, referring to the various objections and exceptions which appear in the report, but the Court overruled the exceptions and denied the motion to again refer the case, and immediately entered up judgment against the defendant for the amount found by the referee, to wit, $6,097.92. This judgment, which is found on pages 10*b* and 10*c* of

the extracts from the transcript of record now before the Court, duly signed by the judge, terminates with these words: "And thereupon the defendant, by her attorneys, gives notice of an appeal to the Supreme Court of the Territory of New Mexico."

The judgment was entered September 15, 1898, and October 4, 1898, the defendant filed her appeal bond which was duly approved by the judge.

For some reason which the record does not disclose, there had been no formal order entered upon the records of the Court granting the appeal. After the appeal bond was filed, to wit, on the 13th of July, 1899, the defendant, by her attorneys, moved the Court for an order directing the clerk to enter an order granting the appeal as of October 4, 1898. This motion the Court overruled and denied. (See extracts from Transcript 10*e* and 10*f*.) Subsequently, the defendant sued out a writ of error from the Supreme Court of the Territory of New Mexico, filed a bill of exceptions, and duly presented the same to the Court to be settled and approved, but the court declined to do so, the defendant excepting to the action of the Court. Exception was also duly taken to the refusal of the judge to direct the clerk to enter an order *nunc pro tunc* granting an appeal.

But without regard to the aforesaid rulings of the trial judge, the case seems to have been duly docketed in the Supreme Court of the Territory as two separate cases, one upon the writ of error the other upon the appeal. The transcript of record certified up from the District Court embraced the entire report made by the referee, including the testimony with the objections and exceptions saved and reserved and noted therein. Assignment of errors were duly filed by the defendant in the Supreme Court. These were **9** in number, and are found on page **11** of the extracts.

Following the filing of the assignment of errors by the plaintiff in error, the appellee and defendant in error filed a motion to strike from the transcript filed in each of the two cases so much and such part thereof as purported to set forth the evidence adduced on the hearing of the cause sought to be reviewed, and to affirm the judgment of the court below, and to enter judgment in the Supreme Court against the appellant and the sureties on her supersedeas bond for the amount of said judgment. This motion to strike from the transcript the evidence in the case and to affirm the judgment of the court below was submitted to the Supreme Court of New Mexico, and the motion overruled, except in that portion which asked an affirmance of the judgment of the court below. The judgment was then declared to be affirmed on the sole ground that no motion for a new trial was filed in said cause.

The defendant moved for a rehearing, but the motion was overruled. An appeal to this Court was asked and allowed, but the application made by the appellant to have the court find the facts in the case, in accordance with the requirements of the act of Congress, was denied on the ground that "the appeal had not been perfected in such manner as to bring the facts of the case into this Court."

In an act by the Territorial Legislature, approved March 16, 1899, found on pages 13, 14, and 15 of the brief filed in support of the motion in this case, it was made the law of the Territory that—

> "In all actions tried without a jury, the testimony taken before a court, or that taken by a referee, the transcribed notes of the stenographer in such cases properly certified by the court or referee, and all motions, orders, or decisions made or entered in the progress of the trial of any action, shall become and be a part of the record for the purpose of having the

> case reviewed by the Supreme Court upon appeal or writ of error, without any bill of exceptions settled, signed or sealed, in order to make any such matters a part of the record in cases so tried. It shall not be necessary to make a motion for a new trial in any case tried by the court without a jury, nor shall it be necessary to incorporate a motion for a new trial in a bill of exceptions in any case, but the same shall become a part of the record without so doing."

It appears to us that this is sufficient reply to the second point made in support of the motion. The case was before the court both on appeal and writ of error. It will not do to say that the testimony taken before the referee and containing the objections and exceptions was not a part of the record. This statute explicitly makes it a part of the record. Neither will it do to say that the appeal from the District Court was not properly taken. The court, in rendering the judgment below, explicitly stated that the appeal was asked, and very soon thereafter it approved the appeal bond which specifically provided that the appellant should prosecute her appeal with diligence in the Supreme Court, etc. It was neither material nor necessary to enter upon the records of the court a special order of allowance of the appeal. In Brandies *v.* Cochran, 105 U. S. 262, Chief Justice Waite, delivering the opinion of the court, says: "The circuit judge by taking the security and signing the citation allowed an appeal. No formal allowance was necessary." In support of this the court cites Sage *v.* R.R. Co., 96 U. S. 714. In Brown *v.* McConnell, 124 U. S. 489, the Court, by Chief Justice Waite, declares: "If an appeal is taken by the action of the court in session before the end of the term at which the decree is rendered, no formal citation is necessary, because both parties, being constructively in

court during the entire term, they are charged by law with notice of all that is done in the case affecting their interests." * * * "The appeal taken in open court, if docketed here in time, gives this Court jurisdiction of the subject-matter, and invests it with power to make all orders consistent with proper practice which are needed in the furtherance of justice."

These decisions indicate a general principle which should apply in taking appeals, and I find no law of the Territory modifying the rule. The appeal, therefore, was properly taken from the District Court to the Territorial Supreme Court. The record was properly before that court. The judgment in the lower court was affirmed by the Supreme Court of the Territory on the specific ground that no motion for a new trial had been made in the case below, but the law states that it shall not be necessary to make a motion for new trial in any case tried by the court without a jury. And after disposing of the case in that way, it declined to find the facts upon the record then before it on the ground that the appeal had not been perfected in such manner as to bring the facts of the case into that court.

If the appeal was taken, the whole record of the case was properly in the Supreme Court. And if the obvious meaning of the Territorial law of March 16, 1899, is to control, it was not necessary that a motion should be made for a new trial in the District Court. The Supreme Court therefore erred both in confirming the judgment below, without hearing the case upon the merits, on the ground that there had been no motion for a new trial, and erred in refusing to find the facts because the appeal had not been perfected in such manner as to bring the facts of the case before the court.

As what we have here said goes to both the second and

third points raised by the attorney for the appellee in his motion to dismiss, we shall proceed to examine the last point.

IV.

On this point the attorney declares that the assignments of error filed with the transcript raise no questions which can be reviewed by this Court on this record.

The assignments of error are found on page 21 of the Extracts. If the record of the case in the District Court was properly before the Supreme Court, and if the defendant below was not required to make a motion for a new trial before the Trial Court, then certainly the Territorial Supreme Court erred in its judgment, and erred in refusing to make the findings of facts as required by the U. S. Statutes and the rules of this Court. These errors are sufficiently set out by the attorney for the appellant as will be seen by reference thereto. The third assignment is that the court erred in dismissing said appeal and writ of error, and affirming the judgment of the said District Court for the reasons set forth by the court in its said action and decision. And the fourth assignment declares it to have been error to affirm the judgment of the District Court on the ground that the Transcript of the Record showed that no motion for a new trial had been made. The fifth assignment is: "The court erred in refusing to make findings of fact on which it based its action in dismissing said appeal and writ of error."

The refusal of the Territorial Supreme Court to make findings of fact is put squarely upon the ground that the appeal was not perfected in such manner as to bring the facts of the case into the court. Yet the court examined into the record in order to ascertain whether or not there was such a motion made. If the record was sufficiently

before the court for one purpose, it certainly was for the other.

In his argument in support of his motion, counsel for appellee suggests that the referee by reason of the reference became an independent tribunal, "a mere arbitrator, with power to bind the appellant alone." This sounds like quite a new doctrine. A court cannot usually delegate its judicial powers. The reference in this case was made to Mr. Lee, "as referee, to take the proofs of the *plaintiff* herein, and that said referee, to whom this cause is referred, report his findings of fact and conclusions of law in this cause with all possible speed." The court could not authorize him to decide the case, and made no attempt to do so. He was simply the hand of the court to save the judge from the drudgery of taking the testimony. All his authority must be found in the order of reference. The learned counsel does not suggest any statute or decision to aid his assertion that the referee was an "independent tribunal." But he does suggest that the trial justice refused to settle a bill of exceptions when asked to do so by the appellant, upon the ground, among others, that the referee was an arbitrator with power to bind the appellant alone.

It looks very much as if the District Court and the Territorial Supreme Court had both taken the same view of the powers and functions of the referee as that suggested by counsel in his brief here. The Trial Court must have said, "I will not settle a bill of exceptions as your case was tried before the referee. The proofs, exhibits, objections, and exceptions are not before me; I shall give no attention to any portion of the referee's report other than his recommendation that judgment be entered against defendant for $6,097.92. I will adopt the findings of the referee as the findings of the court, but I will not look into the record of proofs to see if such findings

are bottomed on legal and sufficient evidence. The referee is an independent tribunal with power to bind the appellant alone, and having reported in favor of a judgment against the appellant, that judgment and none other shall be entered."

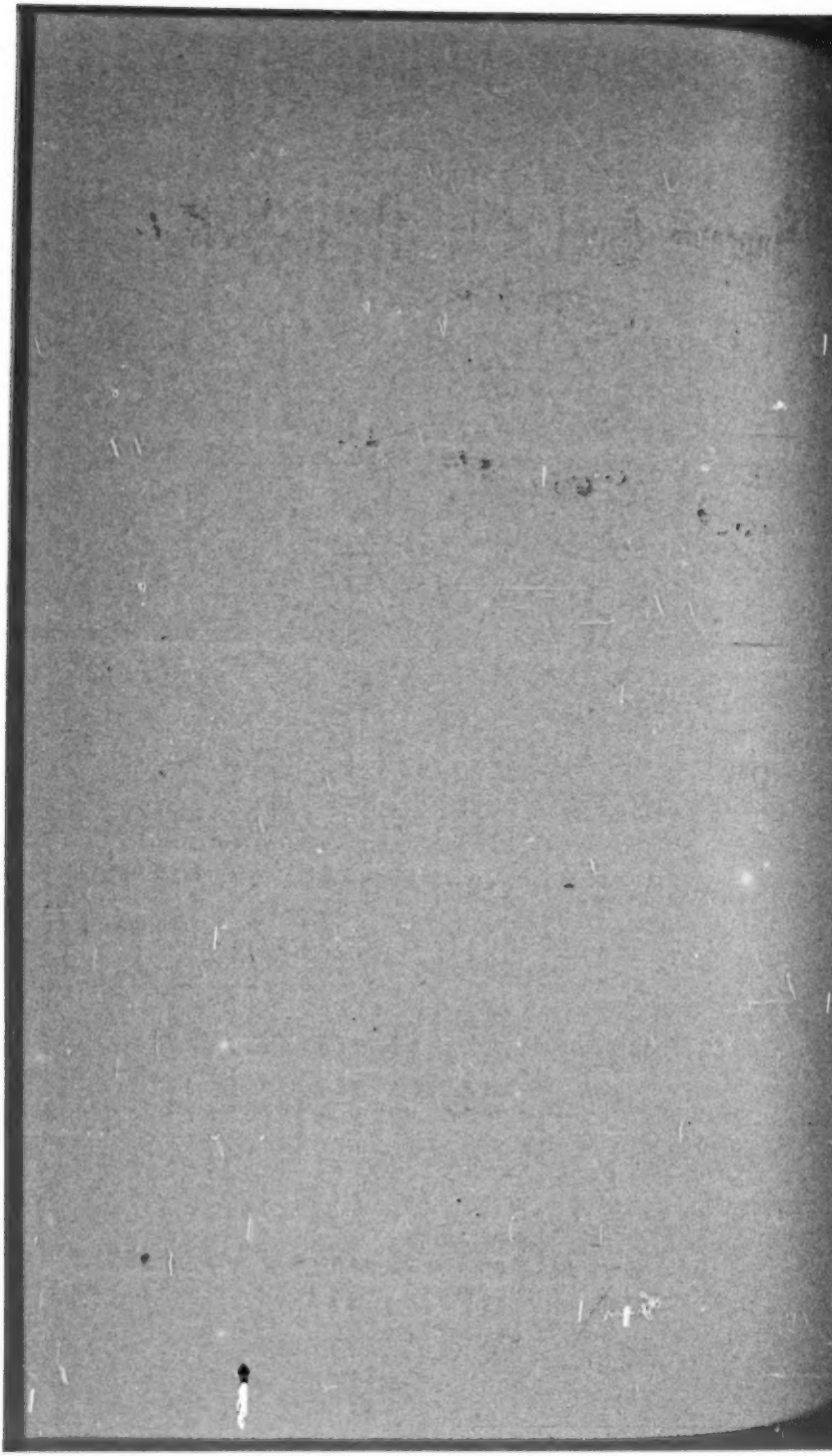
Taking this standpoint, the court refused to examine the testimony taken by the referee for the purpose of settling a bill of exceptions, although the statute of the Territory specifically declared that such testimony, when properly filed in the court, "shall become a part of the record for the purpose of having the case reviewed by the Supreme Court upon appeal or writ of error."

And probably, for some equally good reason, the District Court refused to direct the entry of a formal order allowing appeal. And the Supreme Court, not having a bill of exceptions before it, although the whole record was there on appeal, refused to make findings of fact, as it refused to look into the record brought upon appeal for the purpose of trying the case upon its merits.

With these facts apparent in the record, counsel complains that the appellant has brought the case to this court without "a statement of facts of the case in the nature of a special verdict," as provided in section 2 of the act of April 7, 1874. The obligation under that act is upon the *court* to make and certify such a statement. If the court refuses to do this, the appellant has no other recourse than to have the whole record brought up. Therefore, as we said in the beginning, the appellant has done what she could to get her case properly heard by this Court.

We submit that the case should neither be dismissed nor affirmed, but that all the questions raised should be left to be heard upon the argument of the case on its merits.

J. H. McGOWAN,
Attorney for Appellant.



Office Supreme Court U.S.
FILED
APR 8 1901
JAMES H. McKENNEY,
Clerk.

No. 243.

Supreme Court of the United States.

OCTOBER TERM, 1900.

Filed April 8, 1901.

BARBARA CHAVEZ DE ARMIJO,
APPELLANT,
v.
JUSTO R. ARMIJO.
No. 243.

BRIEF OF APPELLANT.

J. H. McGOWAN,
Attorney for Appellant.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1901.

24961

Supreme Court of the United States.

OCTOBER TERM, 1900.

BARBARA CHAVEZ DE ARMIJO *v.* JUSTO ARMIJO.	*No.* 243.

STATEMENT AND BRIEF ON BEHALF OF APPELLANT.

The case is in this court on appeal from the Supreme Court of the Territory of New Mexico. It is in assumpsit, and was commenced in the District Court for the county of Bernalillo. The declaration is on the common counts, alleging damages in the sum of ten thousand dollars, filed February 13, 1897. The defendant (appellant here) plead the general issue with notice of set-off. A bill of items was filed with the declaration. Upon these pleadings the issue was joined. (Rec. 1, 2, 3, 4.)

On motion of the defendant the cause was referred to Wm. D. Lee, with the order that he "take the proofs of the plaintiff herein, and that said referee, to whom this cause is referred, report his findings of fact and conclusions of law in this cause with all possible speed." (Rec. 5, 6.)

Subsequently, and on the 18th day of August, 1898, the referee reported as follows:

In the District Court, County of Bernalillo, Territory of New Mexico.

JUSTO R. ARMIJO
v.
BARBARA CHAVEZ DE ARMIJO. } No. 4728.

REFEREE'S REPORT.

To the Honorable J. W. Crumpacker, Associate Justice of the Supreme Court of the Territory of New Mexico, and judge of said district court:

As referee in the above-entitled cause, I do respectfully report: That having heretofore been appointed referee in the above-entitled cause, I caused said parties, together with their repective counsel and witnesses, in pursuance of due notice given in accordance with the statute, to appear before me in my office in the city of Albuquerque, on the 5th day of May, 1898, and on a number of days thereafter, for the purpose of submitting their respective proofs in the above-entitled cause. That a large amount of typewritten testimony was taken before me, comprising one hundred and sixty-one pages of such typewritten testimony, and a large number of exhibits were introduced in evidence, and filed with me as referee, all of which testimony and exhibits are returned herewith as a part of my report.

Said case is an action in assumpsit on the common counts, wherein the plaintiff demands ten thousand dollars damages.

The defendant pleads non-assumpsit and a set-off for fourteen thousand dollars also on the common counts against the plaintiff.

The issues being thus formed, it would appear the controversy would be simply the correct balance between them, but the first question that arose was as to the existence of

a contract claimed to have been entered into between the parties on the 20th day of June, 1892, by which the defendant had employed the plaintiff to work for her at an annual salary of $2,500 per year, which alleged contract was claimed to have been in writing, but had been lost. The existence of this contract was most emphatically denied by defendant, thus raising an issue of fact, the existence of which extended through many days, making a record of many pages of typewriting.

Plaintiff introduced what he claimed to be a copy of the contract, which reads as follows:

"Copy, April 25, 1898."

ALBUQUERQUE, N. MEX., *June* 25, 1892.

This agreement made on the date above written between us is: That from the first day of January, 1892, J. R. Armijo shall be paid for his services at the rate of ($2,500.00) two thousand five hundred dollars per year.

J. R. ARMIJO.

MRS. N. T. ARMIJO.

(The above is a certified translation made by the court stenographer.)

If this contract should be admitted in evidence it would prove but one uncontroverted question in the case, and that is as to the amount of plaintiff's compensation. The fact that plaintiff performed the services as set forth in the declaration is not denied, nor is the testimony of plaintiff as to the value of his services disputed by any other evidence in the case. Mr. Dickmann was asked as to the value of the services for collecting the rents for the N. T. Armijo building, which he said were five per cent., but does not pretend to say what the services of plaintiff were or the value thereof. The defendant herself does not claim

to know, but testifies most positively that she does not know. On page 59 of the record, in answer to a question, she gives an unequivocal answer as follows :

Q. Mrs. Armijo, do you know what the services of J. R. Armijo were reasonably worth in acting for you as your agent during the period he was so engaged up to December 31, 1896, for each year ?

A. I don't know what the services were worth; they must have been like the services of all managers.

Q. Do you know, Mrs. Armijo, what services were performed by J. R. Armijo for you during these years, before December 31, 1896 ?

A. He collected my rents, attended to all my business, taxes and all, collect the rents, pay the taxes every year, and pay my accounts every year.

Q. Do you know how much of his time was occupied to do that ?

A. I do not.

The testimony of defendant shows that the employment of plaintiff was not confined to collecting rents of the Armijo building, while the testimony of plaintiff is to the effect that the entire charge and management of the whole estate was the services rendered.

There being no testimony offered on the part of the defendant in any way controverting the value plaintiff sets upon his services, the admission of the contract becomes immaterial, and it would have no effect on the result of the case. Plaintiff testifies that his services were worth twenty-five hundred dollars per annum, the same amount as which was claimed to be fixed in the alleged agreement, and as there is no testimony controverting this value, the referee will have to take this amount as correct in summing up the case.

There is no dispute as to the period of services rendered by plaintiff for defendant, being five years, nor is there any question or dispute as to the amount of money claimed by plaintiff to have been advanced by him for the use of defendant, this amount being $3,717.65.

The defendant introduces under her set-off a note given by plaintiff for the sum of $6,000, made July 11, 1892, with interest at four per cent. per annum; also a check for $3,824.48 cash that plaintiff received from defendant about the date of his employment, and which defendant testifies and claims was paid plaintiff as an advance for services to be rendered in the future. There is no evidence on the part of plaintiff disputing the first of these items. He admits giving the note, and says in his testimony that it was for borrowed money. As to the second item there is not sufficient proof to establish it as a gift from defendant to plaintiff, as claimed by him; referee therefore finds that said plaintiff is properly chargeable with the amount of said item.

A statement of the account between them, as shown by the evidence, is as follows:

Amount claimed by Mrs. N. T. Armijo to have been paid to J. R. Armijo for future services	$3,824.48
Less salary for J. R. Armijo for year 1892 ...	2,500.00
Jan. 1, 1893. Balance due Mrs. N. T. Armijo on money advanced	1,324.48
Jan. 1, 1894. Note of J. R. Armijo to Mrs. N. T. Armijo, dated July 11, 1892	6,000.00
Jan. 1, 1894. Interest on above note from July 11, 1892, to January 1, 1894, at 4 per	

cent., one year, five months and twenty days	$353.33
Jan. 1, 1894. Amount due Mrs. Armijo	7,677.81
Less salary for J. R. Armijo for 1893	2,500.00
Amount due Mrs. Armijo Jan. 1, 1894.	5,177.81
Jan. 1, 1895. Interest at 4 per cent. 1 year	207.11
Jan. 1, 1895. Amount due Mrs. Armijo	5,384.92
Less salary for J. R. Armijo for 1894	2,500.00
Amount due Mrs. Armijo Jan. 1, 1895.	2,884.92
Jan. 1, 1896. Interest at 4 per cent. 1 year	115.39
Jan. 1, 1896. Amount due Mrs. Armijo	3,000.31
Less salary J. R. Armijo for 1895	2,500.00
Amount due Mrs. Armijo Jan. 1, 1896.	500.31
April 1, 1896. Three months' interest at 4 per cent	5.00
	505.31
April 1, 1896. Salary J. R. Armijo three months	625.00
Balance due J. R. Armijo, April 1, 1896	119.69
Dec. 31, 1896. Salary due J. R. Armijo, from April 1, 1896, to December 31, 1896, 9 months	1,875.00
Balance due J. R. Armijo Jan. 1, 1897, on account of salary	1,994.69

Amount advanced by J. R. Armijo for Mrs. Armijo.....	$3,717.65
Total amount due J. R. Armijo Jan. 1, 1897	5,712.34
Amount due J. R. Armijo July 1, 1897, being six months from the date when Mr. Armijo severed his connection with the business of Mrs. Armijo, and being 6 months from the date of the last item in said account	5,712.34
Interest from July 1, 1897, to August 15, 1898, 1 year, one month and 15 days at 6 per cent	385.58
	$6,097.92

In a running account such as this, where money is advanced by both sides, and one party is in the employment of the other, no interest should be allowed on balances unless expressly agreed to, and can only be allowed six months from the date of the last item. In summing up the account, I find that there was due J. R. Armijo a balance of $5,712.34 on January 1st, 1897, and with interest six months from that date up to the present time, or date of this report, at six per cent., being one year, one month and fifteen days, amounts to $385.58. I therefore find that there is a balance due J. R. Armijo from Barbara Chavez de Armijo, on the 15th day of August, 1898, of $6,097.92, and I respectfully recommend that a judgment be entered in favor of J. R. Armijo for that amount, together with costs.

In compliance with the statutes I certify that testimony or proofs were introduced before me for nine full days, and

I have been occupied six days in examining the books, exhibits and testimony and authorities in this cause, which are very voluminous, and in getting up my report as referee.

All of which is respectfully submitted,

WM. D. LEE, *Referee.*

Record 6, 7, 8, 9.

With this report and as a part of it the referee filed the testimony taken before him. This testimony is embraced in the printed record from page 11 to page 110. The defendant duly filed exceptions to the report on the grounds:

First. For that the said referee erroneously reported that there was due to the said plaintiff from the said defendant on August 15, 1898, a balance of $6,097.92; whereas the said refereee should have reported a balance of a large amount due from the plaintiff to the defendant on said account.

Second. For that the said referee erroneously admitted in evidence secondary proof of the contents of the alleged contract between said parties to have been copied from page 988 of the letter-press copybook, marked Exhibit 1, for identification over defendant's objection.

Third. For that the said referee erroneously admitted the paper-writing, Plaintiff's Exhibit 2, for identification over defendant's objection.

Fourth. For that the said referee erroneously overruled the objections of the defendant to the admission and rejection of evidence upon the hearing, which objections appear noted in the report of the said referee, and each one of which objections and exceptions is hereby referred to and made a part hereof as fully as if the same were incorporated herein.

Fifth. For that the findings of fact by said referee are

against the evidence in said cause taken and reported by said referee.

Sixth. And for that the conclusions of law by said referee are insufficient and erroneous.

Seventh. For other errors prejudicial to the defendant and apparent upon the record and of said report.

Wherefore the defendant prays the court that the said report be set aside, and that the said cause be again referred with proper instructions to the referee.

WARREN & FERGUSSON,
Attorneys for Defendant.

Rec. 111.

Subsequently, on September 15, 1898, the court rendered judgment as follows:

It is considered, ordered, and adjudged by the court that the said exceptions be and each of the same hereby is overruled and denied, and that the report of the said referee be and the same hereby is in all things approved and confirmed.

It is further considered, ordered, and adjudged by the court that the findings of the said referee herein be and the same are hereby adopted as the findings of this court, and in pursuance thereof and in accordance therewith it is considered, ordered, and adjudged by the court that the plaintiff, Justo R. Armijo, do have and recover of and from the defendant, Barbara Chavez de Armijo, the sum of six thousand and ninety-seven dollars and ninety-two cents ($6,097.92) with interest thereon at the rate of six per cent. per annum from the 15th day of August, 1899, until paid, together with his costs in this behalf expended to be taxed, including the sum of one hundred and fifty dollars ($150), which is hereby allowed to the said referee for his compen-

sation in the said cause and the sum of sixty-nine and 75-100 dollars ($69.75), which is hereby allowed for the services of the stenographer employed by the referee by consent of the parties in taking down and transcribing the testimony before the referee herein, not including the extra copies of the said testimony furnished by the stenographer to the respective parties in the cause, and that he have execution therefor.

And thereupon the defendant, by her attorney, gives notice of an appeal to the Supreme Court of the Territory of New Mexico.

(Signed) J. W. CRUMPACKER,
Judge.

Rec. 112.

Thereupon, and in due time, the defendant filed an appeal bond, to act as a supersedeas, which bond recited, among other things, that "*the above bounden Barbara Chavez de Armijo, defendant in said action, has prayed an appeal from said judgment to the Supreme Court of the Territory of New Mexico.*"

This bond was duly approved by the judge as follows: "Approved by me this 3d day of October, 1898. J. W. Crumpacker, Judge."

From some cause, not disclosed in the record, no formal order allowing the appeal was entered on the records of the court. On July 13, 1899, the defendant moved the court to direct the clerk to enter an order *nunc pro tunc* as of October 4, 1898. This motion is found on page 114 of the record here, and reads as follows:

"The defendant moves the court for an order directing the clerk of this court to enter an order granting an appeal from the final judgment herein, as of date of October 4, 1898."

"And for ground of this motion, states that on said date an appeal was taken by the said defendant, and allowed by the court to the Supreme Court of this territory; and the appeal bond of said defendant was approved and filed on said date; and the taking of said appeal does not sufficiently appear upon the record or minutes of the court." (Rec. 114.)

The court, by an order, overruled and denied this motion, without giving any reason therefor. To this order the defendant made due exception. (Rec. 115.) However, on the 20th day of October, 1899, the attorneys for the defendant filed a *præcipie* with the clerk of the district court, directing him to make up a transcript of the case to be used on appeal, and the case seems to have been sent to the Supreme Court and duly docketed there as an appeal from the Second Judicial District Court of the Territory. (Rec. 116.)

The defendant also, on September 15, 1899, sued out a writ of error to the said district court and presented a bill of exceptions, which the court refused to sign and settle, and to which refusal the defendant excepted. (Rec. 115, 116, 117.)

After the case reached the Territorial Supreme Court and was docketed on the appeal as cause No. 847, and on the writ of error as cause No. 840, the defendant filed in that court the following assignment of errors:

1. The court erred in overruling the defendant's objections to the report of the referee, and motion to set the same aside upon the grounds specified herein. (Transcript of Record, pp. 185, 186.)

2. The court and referee erred in admitting in evidence secondary evidence of the contents of the alleged copy of contracts between the parties of which Complainant's Exhibit 2 is a copy. (Record, p. 26, *et seq.*)

3. The court and referee erred in admitting evidence of

the alleged services of plaintiff below. (Record, p. 37, *et seq.*)

4. The court and referee erred in overruling the objections of the defendant below to evidence offered on the part of the plaintiff below. (See pp. 47, 91, 117, 135, 170, *et seq.* Transcript of Record.)

5. The court and referee erred in excluding competent evidence offered by defendant below. (See p. 113, *et seq.*, Transcript of Record.)

6. The findings of fact by the referee, approved by the court below, are against the evidence.

7. The conclusions of law found by the referee and approved by court are insufficient and erroneous.

8. The court erred in overruling the motion of plaintiff in error, the defendant below, for entry of an order granting an appeal herein. (Transcript, p. 192.)

9. Other errors apparent upon the face of the record.

WARREN & CHAVEZ,
Attorneys for Plaintiff in Error.

Rec. 117, 118.

Thereafter the attorney for the appellee and defendant in error, in the said cause so pending in the Supreme Court of the Territory, moved the court to affirm the judgment which had been rendered below. The motion and alleged reasons being as follows:

TERRITORY OF NEW MEXICO.

In the Supreme Court, January Term, A. D. 1900.

BARBARA CHAVEZ DE ARMIJO, Appellant,
v.
JUSTO R. ARMIJO, Appellee. } No. 847.

BARBARA CHAVEZ DE ARMIJO, Plaintiff in Error,
v.
JUSTO R. ARMIJO, Defendant in Error. } No. 840.

Motion to Affirm Judgment.

Comes now Justo R. Armijo, appellee and defendant in error in the above-entitled cause, by Neill B. Field, his attorney, and moves the court to strike from the transcript filed in each of said causes so much and such part thereof as purport to set forth the evidence adduced on the hearing of the cause sought to be reviewed, and to affirm the judgment of the court below, and to enter judgment in this court against the appellant and the sureties on her supersedeas bond in cause No. 847, for the amount of said judgment and interest, and for ten per cent. damages, for the following reasons:

I.

Because no question of law is properly reserved for determination by this court upon the record as made up.

II.

Because no motion for new trial was filed in the court below within ten days after the rendition of the judgment sought to be reviewed, as required by law.

III.

Because what purports to be the oral testimony taken before the referee in said cause is not authenticated as required by law, and is therefore no part of the record.

IV.

Because *if* affirmatively appears from the transcript that the documentary evidence used before the referee was omitted from the transcript by direction of the attorneys for plaintiff in error and appellant, and the sufficiency of the evidence to support the findings and judgment cannot be reviewed, if what purports to be the oral evidence were properly authenticated.

V.

Because the so-called assignment of errors is insufficient and does not require an examination of alleged errors at the hands of the court.

VI.

Because the so-called brief of appellant and plaintiff in error is in no sense a brief, but amounts to a mere evasion of the rules of the court requiring briefs to be filed.

VII.

Because the appeal and writ of error have operated to stay proceedings on the judgment of the district court, and appear to have been taken and sued out merely for delay.

NEILL B. FIELD,

Attorney for Appellee and Plaintiff in Error.

Rec. 119, 120.

The case being entitled as Nos. 840–7, was heard on this motion, and the judgment below affirmed on the sole ground that no motion for a new trial was filed in the case in the district court. (Rec. 121.)

The plaintiff in error and appellant, asked for a rehearing on these grounds:

1. In sustaining the respective motions of defendant in error and appellee to affirm the judgment below, this court overlooked the following error duly assigned them:

(8). The court erred in overruling the motion of appellant and plaintiff in error for entry of an order granting an appeal herein. (Transcript, p. 192.)

The supersedeas appeal bond approved and signed by his honor, the judge of the district court below, on October 4, 1892, expressly recites the appeal prayed by said defendant, Barbara Chavez de Armijo, from the judgment below to this court (p. 188), and this court overruled the recital of said fact in sustaining the motion of defendant in error upon said ground.

2. This court, in affirming the judgment below, overlooked the fact, shown by the record herein, that in the district court below due written objections and exceptions were filed in due time by the defendant below and argued and submitted to said district court, and that, therefore, under the rules and practice in such cases provided, a motion for a new trial was not required or necessary, and such motion upon said facts would have been a reflection upon the court below.

3. This court overlooked the assignment of errors, No. 3, as follows: "The court and referee erred in admitting evidence of value of the alleged services of plaintiff below." (Record, p. 37.)

The record distinctly shows that plaintiff below, himself, testified that his services were rendered under a written

agreement between the parties (p. 36, Record), and that said agreement had been written and signed upon p. 988 of the letter-press copy-book offered in evidence (Record, p. 47), and that said page containing such alleged written agreement had been removed from said book and was lost.

Upon the facts testified to by plaintiff, we submit that while evidence of the contents of the lost paper might have been admissible in evidence, it was clearly an error decisive of this cause to permit a recovery upon testimony of plaintiff to the value of such alleged services upon a *quantum meruit* as reported by the referee and entered by the court. (Rec. 122.)

The court overruled this motion for a rehearing, and thereupon the plaintiff in error and appellant sued out an appeal to this court, and asked the Supreme Court of the Territory to make findings of facts in the case as required by act of Congress.

The court allowed the appeal, but refused to make findings onthe ground that "the appeal not having been perfected in such manner as to bring the facts of the case into this court." (Rec. 123, 125.)

With the appeal was filed in the Supreme Court and made a part of the record the following

Assignment of Errors.

The said Supreme Court of the Territory of New Mexico erred in the following particulars:

1. The court erred in dismissing the appeal and writ of error of the appellant herein from the District Court of the Second Judicial District of said Territory, on motion of the appellee, without hearing this cause on the merits.

2. The court erred in dismissing said appeal and writ of error on the motion of appellee, and affirming the judgment

of the said district court for the reasons set out in said motion.

3. The court erred in dismissing said appeal and writ of error, and affirming the judgment of the said district court for the reasons set forth by the court in its said action and decision.

4. The court erred in dismissing said appeal and writ of error, and affirming the judgment of said district court for the reason that the transcript of record showed that a motion for a new trial had not been filed in said district court.

5. The court erred in refusing to make findings of fact on which it had based its action in dismissing said appeal and writ of error.

6. The court erred in inspecting the transcript of the record in this cause for the purpose of ascertaining that a motion for a new trial had not been filed in said cause, and at the same time refusing to inspect said transcript to consider and adjudge the whole case on its merits.

Wherefore this appellant humbly prays this honorable court that the actic and decision of said Supreme Court of the Territory of New Mexico may be reversed and this cause remanded, with such instructions as may be meet and proper.

H. L. WARREN,
Attorney for Appellant.

Rec. 127.

ARGUMENT.

A discussion of the 4th and 5th assignments of errors will probably sufficiently cover the whole contention which we wish to make in this court.

We shall take these up in the inverse order. The 5th

assignment is that the court erred in refusing to make findings of fact.

The proviso to section 2 of the act of April 7, 1874 (18 Stat. 27), makes it the duty of the territorial court, on appeals to this court, to make and certify a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to.

The Supreme Court refused to obey the requirements of this act on the sole ground that the appeal had not been perfected in such manner as to bring the facts of the case from the district court into that court. If the case was properly before the Supreme Court, either on the appeal or by reason of the writ of error, then this refusal was such error as to require the case to be remanded with instructions.

Was the case properly in the Supreme Court of the Territory on appeal?

On page 112 of the record is found the judgment of the district court duly signed by the judge. The last paragraph reads: *And thereupon the defendant, by her attorney, gives notice of an appeal to the Supreme Court of the Territory of New Mexico.*

This evidently was done during the term, and in open court. The record does not show that any citation was issued upon the prayer for appeal. But none was necessary. In Reily *v.* Lamar, 2 Cranch 349, L. ed., 2, 302, a case where there had been no citation on appeal, Chief Justice Marshal stated it "to be the opinion of the court, that the appeal having been prayed, pending the court below, a citation is not necessary, and, therefore, the case is properly before the court."

The latter case, on this point, is cited and approved in Hewitt *v.* Filbert (opinion by Chief Justice Waite), 116

U. S. 142, L. ed., 29–581. Also in Brown *v.* McConnell, 124 U. S. 489, L. ed., 31–495, the court says: "If an appeal is taken by the action of the court in session before the end of the term at which the decree is rendered, no formal citation is necessary, because both parties being constructively in court during the entire term they are charged by law with notice of all that is done in the case affecting their interests."

It is true that the district court in its judgment only states that the defendant gave notice of an appeal, and there is no entry on the records of the court of an allowance of the appeal. But the record of the case (112, 113) shows that eighteen days after the judgment was rendered and the notice of appeal given the judge, at chambers, approved an appeal bond presented by the defendant, which recited the judgment and the prayer for appeal, and was conditioned "that if the said appellant, Barbara Chavez De Armijo, shall prosecute her said appeal from said judgment with due diligence in said Supreme Court, and if said judgment appealed from shall be affirmed, or if her said appeal shall be dismissed, said appellant shall pay the judgment so rendered against her in said cause, and all costs that may be adjudged against her in the said Supreme Court in said appeal, then the above obligation shall be void, but otherwise the same shall remain in full force and effect."

This bond was approved by the judge who rendered the judgment in the following words: "Approved by me this 3d day of October, 1898. J. W. Crumpacker, judge." (Rec. 114.) It was filed in the court the next day.

In Sage *v.* R.R. Co., 96 U. S. 712, L. ed. 24–643, this court, in determining a somewhat similar question, the opinion being rendered by Chief Justice Waite, used the folowing language:

"The statute makes no provision in terms for the form of allowance of an appeal (R. S., Sec. 692); but as there can be no appeal without the taking of security, either for costs or costs and damages, and this is to be done by the court or a judge or justice, the acceptance of the security, if followed when necessary by the signing of a citation, is in legal effect the allowance of an appeal. If the security is given and accepted in open court during the term at which the decree appealed from is rendered no citation is necessary, because the parties being presumptively present during the whole term are charged with notice of all that is done affecting their interests. Whenever, therefore, security for an appeal is accepted during the term an appeal is allowed. If the security is taken out of court, and after the term a citation should be issued to bring in the parties *unless they voluntarily appear*, for until the security has been accepted the allowance of an appeal cannot be said to have been perfected."

In further discussing this question in the opinion, and in allusion to the necessity of a citation, the court says: "No question in respect to a citation arises, because the appellees have appeared."

In a later case, that of Brandies *v.* Cochrane, 105 U. S. 262, L. ed. 26–989, the court, referring to Sage *v.* R.R. Co., declares that "the circuit judge, by taking the security and signing the citation, allowed an appeal. No formal order of allowance was necessary." In this case the court also quotes Draper *v.* Davis, 102 U. S. 370, L. ed. 26–121, where it was held, in a case coming from the Supreme Court of the District of Columbia, that the power of a justice of the court below over the appeal to this court and over the security in the absence of fraud is exhausted when he takes the security and signs the citation, declaring that from that time the control of the supersedeas, as well as the appeal, is transferred to this court.

Now, in the case at bar, the defendant gave notice of an

appeal in open court, perfected her appeal bond, apparently in good time, and filed it, with the judge's approval on it. It seems clear from the judge's deliberate action in approving the bond, with its recitations and conditions, that he considered the notice of appeal set out at the foot of the judgment as equivalent to a prayer and allowance. On this point see U. S. *v.* Adams, 73 U. S. 101, L. ed. 18–792.

No complaint has been made by the appellee of the absence of a citation. The Supreme Court of the Territory places its judgment, affirming the decision of the district court, upon the sole ground that the defendant below made no motion in the District Court for a new trial. (Rec. 121.)

But it puts its refusal to find the facts upon the ground that the appeal was not perfected in such a manner as to bring the facts of the case into that court.

If the proceedings to secure an appeal, which were taken in open court, and the approval of the appeal bond were sufficient to perfect the appeal, then the facts of the case were properly in the appellate court.

The point of attack seems to be that the testimony taken before the referee was no part of his report, and hence no part of the record of the district court, and therefore was not legally brought into the Supreme Court. The provision of Sub-section 152, of the Code of Civil Procedure of New Mexico, as quoted by the attorney for the appellee in his motion to dismiss this case, directs that all testimony before a referee "shall be reduced to writing;" and Sub-section 153 reads as follows:

Sub-Sec. 153. Referees shall in all cases report as speedily as possible, reciting the order of the court, the notice to the parties, the time and place of stating the account or taking the testimony and all other proceedings had, and return the same, together with the testimony taken, to the court.

Now, when the referee in this case made his report he stated, "that a large amount of typewritten testimony was taken before me comprising 161 pages of such typewritten testimony, and a large number of exhibits were introduced in evidence, and filed with me as referee, *all of which testimony and exhibits are returned herewith as a part of my report.*"

Again, in Sub-section 172, the code enlarging the common law rule as to what should constitute a judgment roll, provides that in all cases tried before the court, either with or without a jury, the testimony and rulings shall be taken down by the court stenographer, and "when such notes are transcribed and the correctness of the same is certified to by the court stenographer, *the same shall come and be a part of the record in such action.* In all actions, the testimony taken by a referee, the transcribed notes of the stenographer, and all motions, orders or decisions made or entered in the progress of the trial of any action, shall become and be a part of the record for the purpose of having the cause reviewed by the Supreme Court of the Territory upon appeal or writ of error, and it shall not be necessary to prepare or have settled, signed or sealed, any bill of exceptions, in order to make any such matters a part of the record in such action."

This sub-section, after providing further, how errors in the stenographer's transcribed notes shall be corrected, then proceeds: "If for any reason it shall be impracticable to make the testimony, taken upon any trial, a part of the record in the manner above provided, it may be made a part of said record upon a bill of exceptions, as heretofore provided by law."

Undoubtedly, in this case, and without these statutes, when the referee's report came in, embracing the testimony taken before him, the court could have entered any judg-

ment thereon it deemed best and proper. Instead of adopting the referee's findings, it could have ignored them and entered up such judgment as it thought best. The court did not resign its judicial functions in the case when it appointed the referee. It could not divest itself of its official duties in that way. This would have been plain without the enactments I have quoted But these statutes fix the matter for the courts of New Mexico.

The referee's report, and the whole of it, was then part of the record, and went properly to the Supreme Court on the appeal. As we have seen, the want of a citation and the omission of a formal order allowing the appeal were not requisite in this case. The appeal was perfected when the bond was approved, and if any irregularities existed in regard to it they were entirely cured by the appearance of the appellee in the appellate court. (Sage *v.* R.R. Co., *supra;* U. S. *v.* Yates, 47 U. S. 608, L. ed. 12–576.) In this case Chief Justice Taney, delivering the opinion of the court, said: "The citation is merely notice to the party, and his appearance, in person or by attorney, is an admission of notice on the record and he cannot afterwards withdraw it." In Carroll *v.* Dorsey, 61 U. S. 204, L. ed. 15–803, Chief Justice Taney repeats this doctrine. Also see Chi. & Pac. R.R. Co. *v.* Blair, 100 U. S. 661, L. ed. 25–587.

There is no question but the appellee appeared in the Supreme Court of the Territory. He there made a motion that the Supreme Court affirm the judgment rendered by the district court, assigning several grounds for such motion, all of which concede that there is a record in that court in the case, but simply contending that the record is not properly made up, inasmuch as it contains the *evidence* taken before the referee.

Then, upon the question of the case being properly in the Supreme Court of the Territory upon appeal, we have

these three points apparent in the record: 1st. An appeal was prayed in open court at the time the judgment was rendered. 2d. An appeal bond was duly approved by the judge. 3d. The appellee appeared in the appellate court.

And as to whether the appeal was so perfected that the Supreme Court should have made the findings required by the act of April 7, 1874 (18 Stat. 27), we recur to the Code of New Mexico, cited above, and show that the whole record was there, and properly there, including the testimony taken before the referee. First, such testimony was part of his report, and hence a part of the judgment roll or judgment record. Second, the law, under which the case was tried, distinctly made "the testimony taken by a referee * * * a part of the record for the purpose of having the cause reviewed by the Supreme Court of the Territory upon appeal or writ of error." The act further declaring that in such event "it shall not be necessary to prepare or have settled, signed, or sealed any bill of exceptions in order to make any such matters a part of the record in such action."

Therefore, how can it be said that the appeal carried before the Supreme Court the pleadings, orders, judgment, etc., just those things that went to make up the judgment roll at common law, and did not take up the testimony taken before the referee. It is clearly the opinion of the Supreme Court that such testimony was not before it, and upon this theory it refused to find the facts.

This theory of the court below, I deduce from its language in refusing to make findings. The Chief Justice says they are unable to find the facts, "the appeal not having been perfected in such manner as to bring the facts of the case into this court."

Counsel for the appellee in his motion to dismiss the case out of this court, seems to construe the action of the Supreme

Court in refusing to make findings exactly as I have; that is, he alleges in substance, the court knew, as a matter of fact, that what was before it purporting to be the record of the case in the district court, embraced the testimony taken before the referee; but held that, as a question of law, it was not there.

If, then, we have shown that the record before the Supreme Court properly embraced *all* the proceedings before the referee and the district court, including the testimony taken, the objections of the defendant (below) to the admission of certain portions of the plaintiff's proofs, and the exceptions to the rulings by the referee, the court was clearly in error in refusing our motion to find the facts.

The Writ of Error.

The case was before the Supreme Court on a writ of error as well as upon appeal. The *præcipe* is found on page 116 of the record. The clerk of the district court is asked to transcribe for use on the appeal to the Supreme Court, among other things, the referee's report, including the testimony taken before him.

It is true the district judge refused to settle and sign a bill of exceptions presented to him (Rec. 117), which bill embraced the testimony taken before the referee with the objections, rulings and exceptions duly noted therein. The court assigned no reasons for this ruling. Yet, regardless of the court's refusal, the transcript was made as requested by the *præcipe*, and the whole record, including the testimony sent to the appellate court.

We were warranted by the statute of the Territory in taking this course. By the terms of an act of the legislature of New Mexico, approved March 16, 1899, it was provided: "In all actions tried without a jury, the testimony

taken before a court, or that taken by a referee, the transcribed notes of the stenographer in such cases, properly certified by the court or referee, * * * shall become and be a part of the record for the purpose of having the case reviewed by the Supreme Court upon appeal *or writ of error, without any bill of exceptions settled, signed or sealed, in order to make any such matters a part of the record in cases so tried.*"

The reason for this law was possibly to meet just such cases as this, where the judge, without giving reasons, should refuse to settle a bill of exceptions. In any event, the law was made for the protection of parties desiring to have their cases reviewed by the Supreme Court.

The case was docketed in the Supreme Court as two cases, the one on appeal and the other on error, and was given two separate numbers. And I shall be able to show that the Supreme Court dealt with the case on appeal for one purpose and the case on error for another.

But my present purpose, in this connection, is to show that the *whole record*, as provided by statute, was before the court both on the appeal and on the writ of error, thus emphasizing our contention that the court was wholly unwarranted in refusing to find the facts.

II.

In our fourth assignment we charge that the court erred in affirming the judgment of the district court on the sole ground that no motion had been made in the latter court for a new trial.

The rules governing the district courts, and those governing the Supreme Court of the Territory, so far as I have been able to ascertain, did not require the appellant to make such a motion.

In a volume of rules found in the U. S. Supreme Court library, which bears the imprint of 1880, I find, among the rules made to govern the district courts, rule 24, which provides that the party proposing to appeal, or take up on error, must submit his bill of exceptions within ten days after the judgment is rendered "*if the appellant desires to present exceptions not appearing in the record.*"

This rule 24 is the only one among all the court rules of the Territory which touches upon the subject of appeals, and no provisions anywhere for motions for new trials.

But the laws of the Territory make specific provisions on this point. Sub-section 133 of Section 2685 of the Code of Civil Procedure reads:

Sub-sec. 133. All motions for new trials, *in cases tried by juries*, shall be filed during the term of the court at which the case is tried, and within five days after the rendition of the verdict or findings.

An act of the Territorial Legislature, approved March 16, 1899, provided, among other things, that "it shall not be necessary to make a motion for a new trial in any case tried by the court without a jury, nor shall it be necessary to incorporate a motion for a new trial in a bill of exceptions in any case, but the same shall become a part of the (record) without doing so."

This act of 1899 was passed and in force before the case was taken into the Supreme Court on the appeal or the writ of error. In fact it was six months after its approval before the writ of error was sued out. I find nothing in its terms that confines its application to suits thereafter to be brought. It appears to us that the court was bound by it, and the decision confirming the judgment of the district court on the ground that no motion had been made for a new trial, was in violation of this law.

But whatever contention might be made as to this, there

can be no question as to the construction that should have been given to Sub-section 133, especially in the absence of any rule. In that section the legislature had taken up the subject of motions for new trials. It fixed limits on such motions in cases "tried by juries." This left all other questions relating to motions for new trials to the ordinary or common law rules of practice. Then, without a written rule of the court governing the matter, the defendant in the original suit had the option to ask for a new trial, or to take the case, after judgment, directly to the Supreme Court.

But, in addition to this, we urge that the motion made by the defendant in the trial court to set aside the report of the referee and again refer the cause with instructions (Rec. 111), was the legal equivalent of a motion for a new trial. In fact, it was the only motion in the nature of a motion for a new trial that could be made. In Hartley *v.* Chidester, 36 Kan., 363, the defeated party filed a motion "to set aside and vacate the verdict of the jury," on the ground that the verdict was not sustained by sufficient evidence, was contrary to law, &c., and the Supreme Court of that State treated and held the motion as one for a new trial.

But counsel for the appellee here, in his brief on motion to dismiss, alleges that the Supreme Court of New Mexico holds that "where a jury is waived and the cause is tried by the court, the unsuccessful party, to entitle himself to a revision of the facts by the appellate court, must move for a new trial below, and, if refused, embody the evidence in a bill of exceptions." This quotation he takes from the syllabus of the case of Sierra Co. *v.* Dona Ana Co., 5 N. M. 191. But an examination of that case shows the syllabus to be a considerable of an enlargement of the text. While the court decided, in effect, what is quoted, it did so without elaboration, and based its decision on Spiegleberg *v.*

Mink, 1 N. M. 308. In fact, the latter was the first case which passed upon this point, all the other cases cited by counsel simply adopting, without argument, what was supposed to be the decision in the latter case.

Now, turning to this first case on which all the other decisions on this point are based, we find that the court alleges that it was a "matter of practice," if a case was tried *before a jury* in order to secure an appeal the aggrieved party should move for a new trial. From this the court deduces the position that where a jury trial is waived and the court is substituted for the jury, the same practice should prevail. The "matter of practice" mentioned by the court may have grown up by reason of some construction placed on sub-section 133, *supra*, where the legislature dealt with the question of motions for new trials "in cases tried by juries." But even such "matter of practice," based on this sub-section, was not very well bottomed. And, in any event, the practice, whatever it was, was confined to cases tried by juries. And the court enlarged the practice by making it applicable to cases where the jury had been waived and the court substituted.

In the case at bar there was no waiver of jury and no substitution of the court. The case was sent to the referee, under the law providing for such reference, on motion of the defendant and in the declared opposition of the plaintiff. Now, if it is contended that the referee was a substitute for the jury, and that the rule in Spiegleberg *v.* Mink should be applied, then certainly the motion made to set aside the report, "and that the said cause be again referred with proper instructions to the referee," which motion was denied, is a complete and ample substitute for a motion for a new trial.

But if the decision in Spiegleberg *v.* Mink fixed a rule requiring that a motion for new trial must be made in *all*

cases tried in the district courts before an appeal can be taken, it must be said that such rule was wholly abrogated and voided by the statute of 1899, quoted above.

In Conclusion.

The declaration of the lower court, that an application had been made to it to find the facts, and that it could not do so because the appeal was not perfected in such manner as to bring the facts of the case into that court, was in itself a *finding* which this court will consider, and upon which it will remand the case if the record shows that the facts of the case *were properly in that court.* In Little Miami, etc., R.R. Co. *v.* The United States, 108 U. S. 277, L. ed. 27–724, it was held, in substance, that where the findings were not sufficiently specific this court might remand the cause for further inquiry and such further proceedings as the justice of the case might require, citing section 701 of the Revised Statutes, which is applicable to the supreme courts of the various Territories.

This court will also take notice of the decision of the court below. That does not have to be set out in the findings. If the decision is clearly erroneous this court will reverse it, even if there be no findings in the record.

The appellant has never had her day in the appellate court. She is entitled to this. She did what she could to have the case reviewed. We ask the protection of this court.

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, A. D., 1900.

Barbara Chavez de Armijo, *Appellant,*

vs.

Justo R. Armijo.

No. 243.

To Barbara Chavez de Armijo, Appellant:

You will please take notice that on Monday, the 29th day of October, 1900, about the hour of twelve o'clock noon, or as soon thereafter as counsel can be heard, the undersigned will move the Court to dismiss your appeal, or if that may not be done, to affirm the judgment of the Court below for reasons set forth in printed motions, copies of which are hereto annexed, and will also submit a printed argument, a copy of which is hereto annexed, in support of said motions.

NEILL B. FIELD,
Attorney for Appellee.

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, A. D., 1900.

Barbara Chavez de Armijo, *Appellant,* vs. **Justo R. Armijo.**	*No. 243.*

Comes now the appellee, Justo R. Armijo, by Neill B. Field, his attorney, and moves the Court to dismiss the appeal in the above entitled cause, for the following reasons:

I.

Because the appellant did not, within sixty days after the allowance of the appeal by the Supreme Court of New Mexico, docket the said cause and file the record thereof with the Clerk of this court, as required by Section I, of Rule IX, (The appeal was allowed January 26, 1900, Extract page 18, and the record was not filed until April 6, 1900.)

II.

Because the transcript is not made up in accordance with the requirements of Section 2 of the Act of April 7, 1874, and the appellant, in disregard of the provision of said section, has caused to be certified up to this Court the oral evidence taken on the hearing before the referee but has not brought up anything to show that any ruling of the court on the admission or rejection of evidence was excepted to.

III.

Because the Supreme Court of the Territory of New Mexico refused to certify a statement of the facts of the case in the nature of a special verdict but made the following statement:

"Application having been made to the Court to find the facts in this case in accordance with the requirements of the act of Congress, it is ordered to be certified to the Supreme Court of the United States that this Court, for reasons disclosed by the judgment, is unable to find the facts, the appeal not having been perfected in such manner as to bring the facts of the case into this court." Extract, p. p. 19-20.

IV.

Because the assignment of errors filed with the transcript raises no question which can be reviewed by this Court on this record.

NEILL B. FIELD,
Attorney for Appellee.

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, A. D., 1900.

Barbara Chavez de Armijo, *Appellant,*

vs.

Justo R. Armijo.

No. 243.

Comes now the appellee, Justo R. Armijo, by Neill B. Field, his attorney, and moves the Court to affirm the judgment of the Supreme Court of the territory of New Mexico in the above entitled cause and to award him damages against the appellant therein for the following reasons:

I.

That although it may appear from the record that this Court has jurisdiction of this case, it is manifest that the appeal was taken for delay only.

II.

That the questions sought to be re-

viewed are so frivolous as not to need further argument.

Wherefore, appellee prays that the judgment of the Court below may be affirmed.

NEILL B. FIELD,
Attorney for Appellee.

In the Supreme Court

OF THE

UNITED STATES.

OCTOBER TERM, A. D., 1900.

Barbara Chavez de Armijo, *Appellant,*

vs.

Justo R. Armijo.

No. 243.

Brief for Appellee on Motion to Dismiss and Affirm.

STATEMENT OF THE CASE.

On the 13th day of February, 1897, the appellee, Justo R. Armijo, commenced an action against appellant Barbara Chavez de Armijo, in the District Court of Bernalillo County, in the Territory of New Mexico, seeking to recover the sum of $9,434.44 as a balance due for services rendered during five years next before the first day of January, 1897.

The declaration was in assumpsit on the common counts and a bill of particulars of the plaintiff's claim was filed with the declaration.

On the 4th of March, 1897, defendant filed a plea of the general issue and also a plea of set-off.

On the 5th day of March, 1897, plaintiff filed a similiter to the first plea and a replication to the second plea of the defendant and the issues in the case were thereby made up.

On the 20th day of April, 1898, the defendant, by her counsel, moved the Court upon a written motion (Extracts page 5) to refer the case to a referee and on the same day the Court, over the objection of the plaintiff, referred the case to William D. Lee as Referee "to take the proofs of the plaintiff herein and that said referee to whom this cause is referred report his findings of fact and conclusions of law in this cause with all possible speed." (Extracts page 6.)

On the 18th day of August, 1898, the referee filed his report in the clerk's office recommending judgment in favor of plaintiff for $6,097.92 and costs. (Extract page 10.)

On the Second day of September the defendant filed exceptions to the referee's report. (Extract page 10.)

On the 15th day of September the exceptions to the referee's report were overruled, the findings of the referee adopted as the findings of the Court and judgment was rendered for $6,097.92 with interest and costs.

On the 15th day of September 1899, there was

lodged in the Clerk's office a writ of error from the Supreme Court of the Territory of New Mexico which is dated the 14th day of September, 1898. (This date is undoubtedly a clerical error and should be 1899.)

On the 18th day of November, 1899, the defendant, by her attorney's, presented to the judge of the trial court a bill of exceptions but the judge refused to sign the same. The record discloses no further effort on the part of appellant or her counsel to secure the authentication of the evidence or its incorporation into the record by a bill of exceptions or otherwise.

The case was docketed in the Supreme Court of the Territory, both upon the appeal and upon the writ of error, but in that Court no motion was made by counsel for appellee to dismiss the appeal nor was the appeal dismissed. A motion to strike from the transcript filed in each of said causes so much and such part thereof as purports to set forth the evidence adduced on the hearing of the case before the referee, to affirm the judgment of the court below and to enter judgment against the appellant and the sureties on her supersedas bond for the amount of the judgment and interest and ten per cent damages was made and granted in part. Seven grounds were specified in support of the motion. The Supreme Court of the Territory granted the motion upon the second ground specified which was, "Because no motion for new trial was filed in the court below within ten days after the judgment sought to be reviewed was rendered, as required by law." [illegible] affirmed the

judgment of the court below and entered judgment against the appellant and the sureties on her bond for the amount of the original judgment with interest and costs but declined to award damages against the appellant. (Extract page 5.)

A motion for rehearing was filed in the Supreme Court of the Territory and overruled, and thereupon the appellant prayed an appeal to this Court and asked the Court to make findings of fact in accordance with the requirements of the second section of the Act of April 7, 1874, but the Supreme Court of the Territory declined to make such findings of fact and ordered it to be certified to this court that that court could not, for reasons disclosed by the judgment, find the facts because the appeal was not perfected in such manner as to bring the facts of the case into that court. (Extract, pages 19-20.)

The appellant has filed in this court a transcript of more than two hundred printed pages but the extract printed for the information of the court on these motions is to all intents and purposes a complete transcript of the entire record because nothing is omitted therefrom except what purports to be the oral testimony taken before the referee, which oral testimony is not certified by the referee or by the trial judge and is improperly set up, being no part of the record.

The so-called code of civil procedure, of New Mexico, which took effect August 1, 1897, contains the following provisions:

"Sub-Sec. 138. All or any of the issues in the action, whether of fact or of law, or

both, may be referred upon the written consent of the parties."

"Sub-Sec. 139. Where the parties do not so consent, the court may, upon the application of either, or of its own motion direct a reference in the following cases:—

First. Where the trial of issues of fact shall require the examination of a long account on either side, in which case referees may be directed to hear and decide the whole issue, or to report upon any specific question of fact involved therein, or

Second. Where the taking of an account shall be necessary for the information of the Court before judgment, or for carrying a judgment or order into effect, or

Third. When a question of fact other than upon the pleadings shall arise, upon motion or otherwise, in any stage of the action."

"Sub-Sec. 152. Referees shall have power to rule upon objections to testimony, and upon the rejection of any testimony it shall not be taken. All testimony taken before referees shall be reduced to writing, and if either party shall except to the competency of witnessess, or the admission or exclusion of evidence, or any other matter to which exceptions may be taken, the referees, if required, shall state the particulars of the exceptions in their report."

"Sub-Sec. 153. Referees shall in all cases report as speedily as possible reciting the order of the Court, the notice to the parties, the time and place of stating the account or taking the testimony and all other proceedings had, and return the

same, together with the testimony taken, to the Court."

"Sub-Sec. 154. Referees, as soon as a report is ready, shall file the same in the clerk's office and notify the parties, or their attorneys, of the fact, and furnish a copy thereof to any attorney of record, who shall apply for the same, and the day of the filing shall be entered by the clerk on the docket. The parties shall have twenty days from the time of filing the report to file exceptions thereto, and if no exceptions are within that period filed by either party, either party may have an order, as, of course, that the report be confirmed. If exceptions are filed, they shall stand for hearing upon the usual notice."

"Sub-Sec. 155. If exceptions are allowed the matter may again be referred with instructions, if necessary; but if the report is confirmed by the Court, judgment shall be rendered thereon. The same effect shall be given to findings of facts by referees as was heretofore given by law to such findings by masters in chancery under a general reference of a cause."

"Sub-Sec. 172. In all cases tried by the Court, either with or without the intervention of a jury, the testimony and all rulings of the Court shall be taken down by the court stenographer, unless waived by the parties to the action. After such trial any party to the action may require the court stenographer to transcribe the whole or any part of his stenographic notes. When such notes are transcribed and the correctness of the same is certified to by the court stenographer, the same shall become and be a part of the record in such action. In all actions the testi-

mony taken by a referee, the transcribed notes of the stenographer, and all motions, orders or decisions made or entered in the progress of the trial of any action shall become and be a part of the record for the purpose of having the cause reviewed by the Supreme Court of the Territory upon appeal or writ of error, and it shall not be necessary to prepare or have settled, signed or sealed, any bill of exceptions in order to make any of such matters a part of the record in such action. When the stenographer shall have transcribed his stenographic notes he shall file the same in the office of the clerk of the court in which such action has been tried, and shall give notice to the attorneys of the parties to the action of the filing of said transcript, and either party to said action may, at any time within ten days after the service of said notice, file objection to such transcripts, and such objections shall be heard by the judge of such court upon the notice provided for by this act for hearings upon motions, and upon such hearing the judge shall determine and settle such objections, and if the transcript is determined to be incorrect the judge shall require such stenographer to correct the same according to the facts. If for any reason it shall be impracticable to make the testimony taken upon any trial a part of the record in the manner above provided, it may be made part of said record upon bill of exceptions, as heretofore provided by law. The court stenographer shall be compensated for taking down such testimony, in the same manner as now provided by law for such services rendered during a term of court. Said stenographer shall also receive for transcribing

such testimony the compensation now allowed by law, which shall be paid by the party having such notes transcribed."

"Sub-Sec. 132. Upon the rendition of any verdict, or the making of findings in any case tried by the court, judgment shall be immediately rendered thereon, unless notice is given at the time of the intention of the party to make a motion for a new trial."

"Sub-Sec. 133. All motions for new trials in cases tried by juries shall be filed during the term of the court at which the case is tried, and within five days after the rendition of the verdict or findings."**

"Sub-Sec. 134. No motion to set aside any finding nor judgment rendered out of term time shall be entertained unless it shall be filed and a copy thereof served upon the opposite party within ten days after the entry of such finding or judgment."

Complied Laws of 1897, Section 2685.

By an act approved March 16th, 1899, it was provided:

"Sec. 5. That sub-section one hundred and seventy-two (172) of section twenty-six hundred and eighty-five, Chapter One (1), Title XXXIII, of the Complied Laws of 1897, be amended so as to read as follows:- "In all cases tried by the Court, either with or without the intervention of a jury, the testimony, all rulings of the court, objections made and exceptions taken on the trial, shall be taken down by the court stenographer, unless waived by the parties to the action. After such trial any party to the action may require the court stenographer to transcribe the whole or any part of his stenographic notes, and

when the stenographer shall have transcribed his notes, he shall file the same in the office of the Clerk of the Court, in which the action in which they were taken was tried and thereupon, either party to said cause desiring to have the same embodied in a bill of exceptions, may give ten days notice to the opposite party of his intention of applying to the judge of the court in which said cause was tried, to have the judge of said court sign and seal said notes in proper form as a bill of exceptions, and may at the same time give notice of his intention to ask that any additional matters proper to be so incorporated, also be incorporated therein. Upon such notice, unless said transcript shall be shown to be incorrect, and in that case after correction the judge, or his successor, shall settle, sign and seal the said transcript as a bill of exceptions, adding thereto such additional matters properly sought to be added. For the purpose of having said bill of exceptions signed and sealed, it shall be necessary to make out a new copy of the notes of said stenographer, but the same may be referred to and identified as a part of the bill of exceptions; nor shall it be necessary to serve a copy thereof with the notice. If, for any reason, it shall not be impracticable to use the transcript of the stenographer's notes taken upon any trial in the manner above provided for, for the purpose of settling bills of exceptions, bills of exemption may be settled, signed and sealed in the same manner as they have formerly have been, when no stenographer was used. *In all actions tried without a jury, the testimony taken before a court, or that taken by a referee, the transcribed notes of the stenographer in such cases properly certified by the court or referee,*

and all motions, orders or decisions made or entered in the progress of the trial of any action, shall become and be a part of the record for the purpose of having the case reviewed by the Supreme Court upon appeal or writ of error, without any bill of exceptions, and it shall not be necessary to have any bill of exceptions settled, signed or sealed, in order to make any such matters a part of the record in cases so tried. It shall not be necessary to make a motion for a new trial in any case tried by the court without a jury,nor shall it be necessary to incorporate a motion for a new trial in a bill of exceptions in any case, but the same shall become a part of the without so doing. The court stenographer shall be compensated for taking down such testimony, in the same manner as now provided by law for such services rendered during a term of court. And the clerk of the District Court shall be allowed 10 cents per folio for making out and certifying a copy of the record and five cents per folio for certifying any part thereof copies of which may have been furnished by the stenographer, to be paid by the party suing out a writ of error or appeal."

Session laws of 1899, Chapter 75, Sec. 5,page 168.

Prior to the adoption of the code of civil procedure it was provided by statute:

"Sec. 1823. In all the courts in this Territory the common law as recognized in the United States of America shall be the rule of practice and decision."

C.L. 1884, Sec. 1823.

"Sec. 1907. All suits at law in the district courts shall be commenced by filing a declaration in the office of the clerk of the court, and the pleadings and practice shall

be according to the forms and rules of the common law; and all suits in equity shall be commenced by filing a bill in the office of the clerk of the court."

C. L. 1884, Sec. 1907.

"Sec.3. It shall not be necessary, when it is intended to review by appeal or writ of error any judgment of the district court, that a proposed bill of exceptions containing matters not apparent on the face of the record shall be or shall have been prepared included in or served with a copy of any proposed record in any cause, nor shall it be necessary to prepare or have prepared, any proposed bill of exceptions, or serve the same on the opposite party within ten days after judgment, but in any cause now pending, or which may hereafter be pending in the Supreme Court to review the judgment of a district court, any party desiring to have any material matter not apparent on the face of the record made a part of the record, may prepare a bill of exceptions, in which such proposed matter is incorporated, and present the same to the judge at any time within twenty days before the first day of the term of the Supreme Court in which said cause shall be docketed, and shall give the opposite party or his attorney, five days notice of his intention to present such bill of exceptions to the judge, and the opposite party shall within five days thereafter have leave to propose any amendmends to said bill of exceptions, giving notice thereof to the opposite party of the time when such amendment will be proposed and the time for proposing said bill of exceptions, and amendments, may at any time before or after its expiration be enlarged by the judge and the judge shall

settle and sign the exceptions at least ten days before the term of the Supreme Court in which said cause shall be first docketed, unless for cause satisfactory to him, he sould delay the same, in which event he shall settle and sign the same as soon as possible, and either party may at any time before a bill of exceptions is settled and signed, be heard before the judge as to the matter to be included therein, on giving one day notice to the opposite party or his attorney, and should any bill of exceptions not be settled before the time required for the filing of the record in the Supreme Court, such record may be filed in the Supreme Court at any time within ten days after said bill of exceptions shall be settled, and such cause shall be heard the same as if said record had been filed ten days before the first day of the term, provided, that the provisions of this section and the two previous sections of this act, shall not apply to any cause which has been docketed and the record filed in the Supreme Court prior to December 28, 1888."

Session Laws of 1889, Sec. 3, Chap. 1, Page 2.

It is believed that all local legislation touching procedure in the case at bar is here set out. It is set forth at length in order to demonstrate that whether this case is to be governed by the statutes in force at the time the issues were made up, or by the provisions of the code of civil procedure which were in force at the time the case was heard before the referee and at the time the record was certified to the Supreme Court of the Territory, no attempt was made by counsel for appellant to pre-

serve the evidence and the rulings of the referee upon the admission and rejection of evidence in accordance with the requirements of either system of procedure.

No motion for new trial was filed, and when the trial judge refused to settle and sign the bill of exceptions, no effort was made to obtain a certificate from the referee authenticating the evidence, but counsel proceeded upon the theory, apparently, that the clerk's statement: "And thereafter, on to-wit, the 18th day of August, 1898, there was filed in the office of said clerk of said court the oral testimony taken before Hon. W. D. Lee, the referee in said cause, which said testimony is in words and figures following, to-wit:" (Extract page 10), was sufficient to make the oral evidence a part of the record and to preserve the rulings of the referee on the admission and exclusion of evidence for review by the Supreme Court of the Territory. That Court appears not to have determined the question but decided, as its decision is understood by counsel for appellee, that in the absence of a motion for a new trial there was nothing before the Court but the judgment roll.

Whatever power may be claimed for, and conceded to, the Territorial legislature in the regulation of the procedure whereby the Supreme Court of the Territory exercises its appellate jurisdiction, it must be admitted that this Court exercises its jurisdiction to review cases determined by the Supreme Courts of the various Territories by virtue of the legislation of Congress, a jurisdiction

which can neither be enlarged nor abridged by any other legislative body.

The legislation of Congress, so far as material, is as follows:

> "Sec. 2. That the appellate jurisdiction of the Supreme Court of the United States over the judgments and decrees of said Territorial Courts in cases of trial by jury shall be exercised by writ of error, and in all other cases by appeal according to such rules and regulations as to form and modes or proceeding as the said Supreme Court have prescribed or may hereafter prescribe.
>
> Provided, That on appeal, instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the Court on the admission and rejection of evidence when excepted to, shall be made and certified by the Court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree, * * * * * * * *."
>
> 1st. Supp. Rev. Stats. U. S. 7.

The appellant not only disregarded the provisions of the Territorial statutes for the preservation of the evidence and of the rulings of the referee for review by the Supreme Court of the Territory but she has, in utter disregard of the legislation of Congress, caused the evidence at large (without authentication) to be certified up to this Court; although this Court cannot examine that evidence for any purpose. Her counsel has assigned six grounds of error as follows:—

> "The said Supreme Court of the Ter-

ritory of New Mexico erred in the following particulars:

"1. The Court erred in dismissing the appeal and writ of error of the appellant herein from the District Court of the second judicial district of said Territory, on motion of the appellee, without hearing this cause on the merits.

2. The Court erred in dismissing said appeal and writ of error on the motion of appellee and affirming the judgment of the said District Court for the reason set out in said motion.

3. The Court erred in dismissing said appeal and writ of error and affirming the judgment of said District Court, for the reason that the transcript of the record showed that a motion for a new trial had not been filed in said District Court.

5. The Court erred in refusing to make findings of fact on which it based its action in dismissing said appeal and writ of error.

6. The Court erred in inspecting the transcript of the record in this case for the purposes of ascertaining that a motion for a new trial had not been filed in said cause and at the same time refusing to inspect said transcript to consider and adjudge the whole case on its merits." (*Extract, page 21.*)

It will be observed that no one of the assignments attempts to call in question or bring up for review any action of the trial Court but all are based upon alleged errors committed by the Supreme Court of New Mexico.

The first four are apparently based upon a

misconception of what was actually done by that Court while the sixth is clearly frivolous.

The meaning of the fifth assignment is by no means clear. If it is to be taken literally, it is contradicted by the record. The Supreme Court of New Mexico found, as a fact, from an inspection of the record that no motion for a new trial was filed in the Court below. It adjudged, as matter of law, that in the absence of a motion for new trial, it could not examine the errors complained of, and affirmed the judgment of the trial Court.

It refused to make findings of fact, holding as matter of law, that the evidence was not before it. It affirmed, however, the judgment of the Court below.

By its judgment the trial court adopted the findings of the referee, as its findings and that judgment is not attacked and no error is assigned thereon in this court.

Errors, if any, committed by the Supreme Court of New Mexico in the exercise of its appellate jurisdiction in this case were and are without prejudice to the appellant unless error prejudicial to her rights was committed by the trial court.

An assignment of errors based entirely upon the action of the supreme court of the Territory and which alleges no error of law upon the part of the trial court is not such an assignment of errors as is required by the statute of the United States and presents no question for review by this court.

The appellee has filed a motion to dismiss the appeal upon the following grounds:

I

Because the appellant did not, within sixty days after allowance of the appeal by the Supreme Court of New Mexico, docket the said cause and file the record thereof with the clerk of this Court, as required by Section 1 of Rule IX, (the appeal was allowed January 26, 1900, Extract page 18, and the record was not filed until April 6, 1900).

II

Because the transcript is not made up in accordance with the requirements of Section 2 of the act of April 7th, 1874, and the appellant, in disregard of the provision of same section, has caused to be certified up to this Court the oral evidence taken on the hearing before the referee but has not brought up anything to show that any ruling of the Court on the admission or rejection of evidence was excepting to.

III

Because the Supreme Court of the Territory of New Mexico refused to certify the statement of the facts of the case in the nature of a special verdict but made the following statement:

"Application having been made to the Court to find the facts in this case in accordance with the requirements of the act of Congress, it is ordered to be certified to the Supreme Court of the United States that this Court, for reasons disclosed by the judgment is unable to find the facts, appeal not having been perfected in such a manner as to bring the facts of the case into this court." (Extract, p. p. 19-20.)

IV.

Because the assignment of errors filed with the transcript raises no question which can be reviewed by this Court on this record.

Appellee has also filed a motion to affirm the judgment of the Supreme Court of New Mexico, as the rules of this court permit, and assigns the following grounds therefor:

I.

That although it may appear from the record that this Court has jurisdiction of this case, it is manifest that the appeal was taken for delay only.

II.

That the questions sought to be reviewed are so frivolous as not to need further argument.

Upon these motions appellee submits the following:

POINTS AND AUTHORITIES.

I.

There has been such disregard of all statutory requirements on the part of appellant that her appeal should be dismissed.

It is not contended that this Court is not invested with full jurisdiction to hear and determine every question which can arise upon the record in this case. The contention is, that there has been such irregularity in the method of procedure; such disregard of statutory requirements and such neg-

lect to properly prepare and present the record in such form as would enable the Court, without unnecessary labor, to adjudicate the rights of the parties, that the Court should dismiss the appeal.

The mere delay in filing of the transcript and docketing the appeal, standing alone, would be of no consequence as this Court has frequently decided that it would not dismiss an appeal for such delay. It is urged upon the attention of the Court in this case only in connection with other and much more serious delinquences.

A transcript of more than two hundred pages has been filed. If this cause goes to a hearing upon the merits, this transcript must be printed and read by the Court and all that part of it not printed for use upon this hearing is brought here in defiance of the express command of the statute. That its presentation here will impose additional labor upon the Court and counsel, as well as greatly increase the costs, cannot be denied, nor is it believed that it can be explained otherwise than by the neglect of counsel to inform himself of the provisions of the statute or his refusal to be bound by them.

Again, the assignment of errors filed shows that it must have been prepared without examination of the judgment of the Supreme Court of New Mexico and in utter disregard of the statutory limitations upon the jurisdiction of this Court in such case as this.

It is earnestly insisted that this assignment of errors raises no question which this Court can review upon this record and that there is nothing in

the case which requires the Court to exercise its option to notice a plain error not assigned.

While it is true that the precise question here presented has never been passed upon by this Court, it is submitted that the contention of appellee finds support in several cases heretofore decided.

Benites v. Hampton, 123 U. S., 519.
Rowe v. Phelps, 152 U. S., 87.
Micas v. Williams, 104 U. S., 557.
The Alaska, 130 U. S., 201.
The S. C. Tryon, 105 U. S., 267.
Chanute City v. Trader, 132 U. S., 210.
Walston v. Nevin, 128 U. S., 578.

If the motion to dismiss must be overruled, it is hoped that there is sufficient color for it, to authorize the Court to examine and consider the motion to affirm the judgment of the Court below. If such examination may be entered upon, it is believed that, on this record, the case is fairly within the provisions of paragraph five of rule six of the rules of this court, because it is manifest that the appeal was taken for delay and that the questions sought to be reviewed are so frivolous as not to require argument.

I.

It is manifest that this appeal was taken for delay.

If the report of the referee is a part of the record and can be examined by this Court upon the motion to affirm, it would seem to be clear from that report and from the judgment of the trial Court adopting the referee's findings that the

original appeal to the Supreme Court of the Territory must have been taken for delay and without reasonable hope or expectation of obtaining a reversal because it is a firmly established rule of the Supreme Court of New Mexico that such a finding made upon conflicting evidence will not be disturbed by the Supreme Court, but, in addition to this, this record discloses the fact that no motion for new trial was filed in the trial Court within the time prescribed by law, nor was the evidence made part of the record by bill of exceptions or anything equivalent thereto.

The rulings of the referee upon the admission and rejection of evidence were not preserved and the assignment of errors filed in the Supreme Court of the Territory is not at all in conformity with the requirements of the rules of that Court.

The decisions of the Supreme Court of New Mexico from the organization of that Court to the present time are uniform to the effect that, "Where a jury is waived and the cause is tried by the Court, the unsuccessful party, to entitle himself to a revision of the facts by the appellate Court, must move for a new trial below and, if refused, embody the evidence in a bill of exceptions." The quotation is from the syllabus of the case of Sierra County vs. Don Ana County, 5 New Mexico, 191.

The line of decisions begins with Speigleberg vs. Mink, 1 N. M., 308, and is unbroken to the case of Insurance Company vs. Walker, decided at the same term as the case at bar and not yet reported.

The same uniformity of decision by the

Supreme Court of New Mexico is found with reference to the effect of the findings of the Court based upon disputed evidence in cases where jury is waived. The doctrine is first laid down in Zanz vs. Stover, 2 N. M., 34, in the following language:

"The Court having acted in this case as a jury, so far as its decisions on questions of fact was concerned, its verdict should not be set aside, nor the judgment thereon reversed, in a case where there is any evidence whatever, on which it could be based."

From the time of the decision of the case quoted in 1880, until the present time, the rule then announced has never been departed from. It has been rigidly applied to findings by a master in many cases.

"The court below had, as we have, a mere dry transcript of testimony upon which to base conclusions of fact. It will be necessary to determine whether the findings of fact by a master, which have some evidence to sustain them, will be treated as unassailable in all respects as the verdict of a jury. It will be sufficient to say in this case the findings of fact by a master, which depend upon the weight of conflicting testimony, have every presumption of correctness in their favor, and are not to be set aside or modified unless there clearly appears to have been error or mistake on his part, and that a disregard of this rule by the district court, acting solely on the master's report, and without any new testimony, is reversible error."

DeCordova vs. Korte, 7 N. M., 683.

No reason is perceived why the rule laid down in the case last cited is not applicable to the referee's decision in the case at bar.

If, in the light of these decisions, it could be believed that counsel who took the original appeal to the supreme court of the territory had any reasonable expectation of securing a reversal of the judgment of this case at the hands of that court, such belief must be removed by an examination of the exceptions filed with the referee's report (Extracts p. p. 10a–10b.) and to the assignment of errors filed in the Supreme Court of New Mexico, (Extracts p. 11.)

It is submitted that without a motion for a new trial and a bill of exceptions preserving the evidence and the rulings on the evidence, there was no reason to expect that the Supreme Court of New Mexico would examine any of the errors assigned.

If it is manifest that the appeal to the Supreme Court of New Mexico was taken for delay, the same thing is true of the appeal to this court because in this court error is not assigned upon any action of the trial court.

This court has held in at least one case that it would not review the action of the Supreme Court of a Territory on a question of practice such as this.

Sweeney v. Lomme, 22 Wallace, 208.
Laird v. Upton, 8 N. M., 413.
Torlina v. Trolicht, 6 N. M., 854.
Torlina v. Trolicht, 5 N. M., 148.
Territory v. Christman, 9 N. M., 586.

Lynch v. Grayson, 7 *N. M.*, 26.
Frayson v. Lynch, 163 *U. S.*, 468.
Perez v. Barber, 7 *N. M.*, 223.
Rogers v. Richards, 8 *N. M.*, 658.

II.

The questions sought to be reviewed are too frivolous to require argument.

The case comes into this court without a finding of facts by the Supreme Court of the Territory as required by the second section of the act of 1874. An application was made to that court to make such finding of facts but the court declined to do so upon the ground that appellant had not perfected her appeal in such manner as to bring the evidence before that court.

Whatever the appellant's remedy for a refusal by the Supreme Court of the Territory of New Mexico to make a finding of facts in a proper case, it is certainly not the one upon which appellant apparently relies. She has caused to be certified up what purports to be the oral testimony taken before the referee, which the Supreme Court of New Mexico has declared is no part of the record, ignoring the repeated decisions of this court and the plain language of the act under which this court exercises jurisdiction in this class of cases.

> "Out further examination must proceed upon the finding of facts as made by the court below, for this being an appeal from the Supreme Court of a Territory those findings are conclusive upon this court. The jurisdiction of this court on such an appeal, apart from exceptions duly

taken to rulings on the admission or rejection of edidence, is limited to determining whether the findings of fact support the judgment. Stringfellow v. Cain, 99 U. S., 610; Neslin v. Wells, 101 U. S., 428; Eilers v. Boatman, 111 U. S., 356 Idaho and Oregon Land Company v. Bradbury, 132 U. S., 509; Mammoth Mining Company v. Salt Lake Machine Company, 151 U. S., 447, 450; Haws v. Victoria Copper Mining Company, 160 U. S., 303; Gildersleeve v. New Mexico Company, 161 U. S., 573; Bear Lake and River water Works and Irrigation Gompany v. Garland, 164 U. S., 1, 18."

Harrison v. Perea, 168 U. S. 323.

"In effect, all the assignment of error and the argument based thereon rest in reason on the assumption that the findings of fact certified by the court below are not conclusive, and that this court has the power, in order to pass upon the questions raised, to examine the weight of the evidence and disregard the facts as found. If the argument be that the findings of fact are the mere statement of ultimate legal propositions, and therefore they may be disregarded or reviewed, then the result of the contention is that there are no findings of fact and nothing to review, and if the other aspect be looked at, the views which we have just expressed are conclusive."

Young vs. Amy, 171 U.S., 187.

The appellant when she procured this cause to be sent to a referee against the objection of appellee, thereby waived any right to have the findings of the referee or his rulings on evidence reviewed.

This was, as has been shown, an action of assumpsit in which the parties had a constitutional right to a trial by jury. The appellant, who was the defendant, waived that right and procured the case to be sent to a referee who thereby became as to the appellant an independent tribunal, a mere arbitrator with power to bind the appellant alone, by his decisions.

The review of his decisions upon the evidence or upon the admissibility of evidence is not with the jurisdiction of the supreme court of New Mexico or of this court and it must be presumed that the trial judge refused to settle a bill of exceptions for this and other sufficient reasons.

Bond vs. Dustin, 112 U. S., 604.

Respectfully submitted,

NEILL B. FIELD,

Counsel for Appellee.

No. 243.

FILED
APR 15 1901
JAMES H. McKENNEY,
Clerk.

BRIEF OF APPELLEE.

Brief of Field for Appellee.

Supreme Court of the United States.

Filed April 15, 1901.

OCTOBER TERM, 1900.

No. 243.

BARBARA CHAVEZ DE ARMIJO,
Appellant,

vs.

JUSTO R. ARMIJO.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

NEILL B. FIELD,
Albuquerque, N. M.,
Attorney for Appellee.

C. G. Bussoyne, Walker and Centre Street, N. Y.

Supreme Court of the United States.

October Term, 1900.

BARBARA CHAVEZ DE ARMIJO,
No. 243. Appellant,
vs.
JUSTO R. ARMIJO.

Brief of Appellee.

STATEMENT OF THE CASE.

This transcript, as made up by the clerk of the supreme court of New Mexico, and by the clerk of the trial court, is somewhat confusing. It is quite clear, however, that counsel for appellant in his attempt to state the record has fallen into error as to one very important claim made by him, as to which the transcript shows, he is mistaken. The transcript does not purport to contain all of the evidence considered by the referee. It is possible that the rules of the supreme court of New Mexico are, to some extent, responsible for the confusing character of the transcript, but if this be true, the confusion is due to the act of the counsel of appellant, who represented her in the courts below, and who directed how the transcript should be made up for the supreme court of New Mexico. By rules

adopted August 25th, 1897, and in force after September 1st, of that year, it is provided :

RULE III.

1. All motions, affidavits and other papers filed, and all orders made during the pendency of any suit in the district court, shall be considered a part of the record of said cause without being incorporated in a bill of exceptions; but only such motions, affidavits and papers and orders which may be necessary for a proper determination of questions or issues to be reviewed in the Supreme Court upon appeal or writ of error, shall be incorporated in the transcript of the record transmitted to it.

Whenever it is desired to review the action of the trial Court upon any point or points not involving all of the record and evidence offered on the trial, the appellant or plaintiff in error may serve upon the opposite party, according to the provisions of the code, a transcript of all the record and evidence upon such point or points; the appellee or defendant in error may serve upon the appellant or plaintiff in error any portion of the record or evidence which he claims to have been omitted and to be necessary to a proper review of the question or questions to be raised, and the judge of the trial court shall determine whether such transcript contains all the records or evidence upon such points, and may require the addition of any portion thereof which he deems to have been omitted. Whereupon the judge of the trial court shall certify to the supreme court that the transcript as so settled contains all the record and evidence upon the point or points specified.

The appellant or plaintiff in error shall file in the office of the clerk of the district court a præcipe setting forth the questions he desires to have reviewed and those portions of the record and proceedings he deems necessary to such review, and he shall be bound in the supreme court by the præcipe so filed.

If in such cases the opposite party desires to take up more of the record or evidence than the trial judge determines to hear upon the points to be

reviewed, he may have the additional evidence or parts of the record certified by the judge filed in the clerk's office and by him certified with the rest of the record, and cause the same to be filed in the supreme court at his own expense in the first instance, and, if the supreme court shall hold that the same was necessary to a proper hearing of the case, such expense shall afterwards be taxed in the supreme court as other costs in the case.

In case the whole evidence is taken up, it shall not be necessary for the trial judge to certify, but he may do so at the request of either party.

When the transcript of the record transmitted to the supreme court upon an appeal or writ of error shall contain portions of the record not necessary for a proper determination of the questions or issues to be reviewed by the supreme court, the costs of transcribing or printing such unnecessary portions of the record will be taxed against the party procuring the same.

3. No *certiorari* for diminution of the record shall be allowed in any cause unless a motion therefor shall be made in writing, and the facts on which the same is founded shall, if not admitted by the other party, be verified by affidavit, and all motions for such *certiorari* shall be made at the first day of the term of the entry of the cause, otherwise the same shall not be granted unless upon special cause shown to the court accounting satisfactorily for the delay.

4. The *applicant* or plaintiff in error shall not be heard to suggest a diminution of the record or to ask for a *certiorari* to supply such diminution in any case where such plaintiff in error has caused to be certified to this court less than the entire record, unless such suggestion or motion shall be made on the first day of the term to which the appeal or writ of error is returnable, and shall be accompanied by an affidavit setting forth reasons satisfactory to the court for the omission of the same from the transcript; *mere neglect to include the desired portion of the record in the præcipe shall not be sufficient cause* for the award of the *certiorari* applied for.

Evidently attempting to act under the authority of this rule, counsel for appellant filed in the office of the Clerk the *praecipe* found on page 116 of the transcript, as follows :

> To HARRY P. OWEN, Clerk :
>
> You will please make out a transcript to be used in the above cause on appeal, of the following :
>
> 1. Declaration.
> 2. Defendant's pleas.
> 3. Replication.
> 4. Order of Reference.
> 5. Report of Referee, and *Oral* Testimony taken before Referee.
> 6. Exceptions to Referee's Report and Motion.
> 7. Final Decree.
> 8. Supersedeas Appeal Bond and Approval thereof.
> 9. Motion of Defendant for entry of Appeal.
> 10. Order overruling same.
> 11. This *praecipe*.
>
> WARREN & FERGUSON,
> Attorneys for Defendant.

This *praecipe* appears to have been filed on the 20th day of October, 1899, and in pursuance of it, on the second day of November, 1899, the clerk made a transcript and certified the same as follows :

> I, HARRY P. OWEN, Clerk of the District Court of the Second Judicial District of the Territory of New Mexico, within and for the County of Bernalillo, in accordance with the command contained in the foregoing writ of error, make return thereto by sending to the Supreme Court of the Territory of New Mexico, the foregoing, which I hereby certify to be a true, correct and complete *transcript of so much of the record and proceedings* had in that certain cause lately pending in the District Court for the County of Bernalillo, wherein Justo R. Armijo was plaintiff, and Barbara Chavez de Armijo was defendant, *as was ordered to be certified by the defendant in error, Barbara Chavez de Armijo*, in said cause, as the same appears of record, and on file in my said office.

In witness whereof I have hereunto set my hand and affixed the seal of said Court on this 2d day of November, A. D. 1899.

HARRY P. OWEN,
Clerk.

[SEAL.]

Trans., pp. 116–117.

Following the certificate of the clerk above quoted there is found in the printed transcript this statement:

> Now, on this 18th day of November, A. D. 1899, comes the defendant, by her attorneys, and presents to the court the foregoing bill of exceptions, to be by the court sealed, signed and settled as such, notice thereof having been duly given to the plaintiff, he being present by counsel; but the court declines and refuses to so sign, seal and settle the same, whereupon defendant excepts to the action of the court.
>
> J. W. CRUMPAKER,
> Judge.

This statement by the judge is dated, and appears to have been signed sixteen days after the clerk's certificate, and to be not otherwise authenticated than by the signature of the judge. When the transcript is examined to ascertain what was presented to the judge for his signature, there is found on page 11 the introductory words ordinarily used at the beginning of a bill of exceptions:

> Be it remembered that on the trial of the above-named cause the following proceedings, among others, were had, and that the evidence hereinafter set forth was introduced, and that the objections and exceptions made and taken to such evidence as hereinafter appears were made and taken at the time the evidence was offered, and the rulings of the court were made as to the same, as is set forth in such evidence, and that the evidence hereafter set out was all the evidence introduced and received on the trial of said cause.

It must, I think, be assumed that all of the matter contained in the transcript between the top of page 11 and the signature of the trial judge on page 117, was presented to the trial judge as a bill of exceptions, and that he declined to sign the matter thus presented to him as a bill of exceptions in the cause. If it were incumbent on me to show, affirmatively, by the transcript, that the refusal of the trial judge in this regard was proper, I should merely call attention to the fact, disclosed by the transcript, that more than 50 exhibits, which were offered in evidence by the plaintiff, are omitted from the so-called bill of exceptions, and that, notwithstanding this omission, the trial judge was asked to certify " that the evidence hereafter [in the bill of exceptions] set out was all the evidence introduced and was received on the trial of said cause " *(Transcript, p. 11).*

Counsel for appellant ignores the existence of these fifty odd exhibits and asserts and re-asserts in his brief that all of the evidence considered by the referee was before the supreme court of New Mexico, and that the transcript shows that fact.

Although sub-section 1 of rule 3 of the rules of the supreme court of New Mexico, above quoted, dispenses with the necessity for incorporating a motion for a new trial in the bill of exceptions, as had been formerly held to be necessary, it did not, nor did any other rule or statute of New Mexico (apart from the act of March 16, 1899, set out on pp. 13, 14, 15, of my brief on motion to dismiss), attempt to dispense with the necessity for filing a motion for a new trial, in order to lay the foundation for a review of the proceedings, in an action at law.

The Act of March 16, 1899, was passed six months after the entry of the judgment in this case. This judgment was entered in vacation and not in the term time *(Compiled Laws, 1897, Section 909).*

Under the law as it stood at the time of entry of the judgment no motion to set it aside could be entertained

unless filed and a copy thereof served upon the opposite party within ten days after the entry of the judgment *(Compiled Laws 1897, Sub-section 134 of Section 2685)*.

It is suggested by counsel for appellant that the filing of exceptions to the referee's report is the legal eqvivalent of a motion for a new trial and must be so considered. If this contention is to be sustained we have in this case the anomaly of a motion for a new trial filed thirteen days before the rendition of the judgment sought to be reviewed.

Counsel for appellee understands the supreme court of New Mexico to have held that, there having been no motion for a new trial filed in the court below and no substantial compliance with the statute, so as to make the evidence taken before the referee a part of the record, and no bill of exceptions or anything equivalent thereto, whereby the rulings upon evidence were properly preserved it was unable to make findings of facts in the nature of a special verdict, because the evidence in the case was not before it.

It is cheerfully conceded that the appeal operated to divest the district court of Bernalillo county and to invest the supreme court of New Mexico with full jurisdiction in this cause; that no citation was necessary and that the notice of appeal and the approval of the supersedeas bond were sufficient in law to remove the case into the supreme court without any order granting an appeal, or any other step taken in the district court. When the supreme court of New Mexico directed it to be certified to this court, that that court "for reasons disclosed by the judgment is unable to find the facts, the appeal not having been perfected in such manner as to bring the facts of the case into this court," it had no reference to any supposed insufficiency in the appeal as taken, but referred entirely to the proceedings in the district court, whereby the appellant had failed to have the evidence made a part of the record of the case in that court.

As to the proceeding by writ of error in the supreme court of New Mexico, it seems sufficient to suggest that, by statute, in that territory, distinctions between appeals and writs of error have been abolished, and a party desiring a review of any cause has his election to proceed by either method. *Compiled Laws 1897, Section 2685, Sub-Section 161*, is as follows :

> SUB-SEC. 161. Any person aggrieved by any final judgment or decision of any district court in any civil cause, may, at his election, take an appeal or sue out a writ of error to the supreme court of the territory at any time within twelve months after entry of the same, and have a supersedeas in the same manner as now provided by law in cases of appeals and writs of error.

Although appellant prosecuted both remedies in the supreme court of New Mexico, it is apparent from the transcript that that court treated the proceeding by writ of error as mere surplusage, and that it is inaccurate to say, as is said by counsel for appellant, on page 26 of his brief, "that the supreme court dealt with the case on appeal for one purpose, and the case on error for another." While the transcipt discloses the fact that the case was thus docketed in the supreme court of the territory, it also shows that the judgment of the court below was affirmed, and judgment was entered in the supreme court against the appellant and the sureties on her supersedeas bond in the case on appeal, and that this appeal is prosecuted from that judgment. If the transcript does not show that the two causes were treated as one by the supreme court of New Mexico, it fails to show that the case on error is not yet pending there, because it fails to show any independent disposition of case No. 840 in that court, but does show a judgment in case No. 847 which was the case on appeal.

Four of the six assignments of error in this court are grounded on the alleged action of the supreme court of New Mexico in dismiss-

ing the appeal and writ of error. As matter of fact no such action was taken by that court, and neither the appeal nor the writ of error was dismissed. If there were two cases pending in that court were both brought into this court by one appeal? Looking to the substance of the matter, it is manifest that the court did not "deal with the case on appeal for one purpose and with the case on error for another."

I submit that there is but one question open to review on this record, *i. e*: Do the allegations of the declaration support the judgment? That the suggestion that this case should be sent back to the supreme court of New Mexico with instructions to make findings of fact is utterly without merit, and that this court cannot, on this appeal, remand the case for any such purpose, because, to do so, would be to require that court to make such findings without opportunity to consider the documentary evidence upon which the findings of the referee, as appears from his report, are in a large measure based.

The entire case on behalf of appellant consists of an appeal to this court to ignore the provisions of the act of congress from which it derives its authority to review cases such as this, and to consider evidence brought up in violation of the express provisions of that act for purposes not within the contemplation of the act. A careful analysis of the contention of counsel will show that his ground of complaint is not that the territorial supreme court failed to make findings of fact in the nature of a special verdict, but that, that court failed to review the action of the referee on the admission and exclusion of evidence. It seems to be the opinion of counsel that without findings of facts an error of this character cannot be examined; at least, there is no error assigned which raises this question, if it had been property preserved for review here.

It will be shown, I think, conclusively that such action of the referee was not open, and could not have

been open, to review either in the supreme court o the territory or in this court upon any record tha could have been made up, so long as the hearing be fore the referee was had without the consent of th appellee, and, certainly, that no such review is pos sible upon this record.

The collection of the judgment in this case has bee stayed by *supersedeas* for two years and a half, and it i respectfully submitted that the appeal must have bee taken for delay, only. Appellee therefore asks that th court will award him damages, in accordance with th provisions of its rules.

POINTS AND AUTHORITIES.

I.

This case having been referred, on mo tion of appellant, over objection by appel lee, the rulings of the referee on the ad mission or exclusion of evidence are no open to review.

The statute of New Mexico, set out at length in my brief on motion to dismiss or affirm, provides tha causes may be referred by the court upon condition which are there enumerated. If this statute is to b construed as attempting to confer power upon th court to refer cases such as this over the objection o one of the parties, such construction would clearly render the statute unconstitutional and void. By ex press provision of an act of congress, too familiar t this court to require citation, the right of trial by jury is preserved in the various organized territories of th United States, and territorial legislatures are forbid

den to pass laws which deprive litigants of the right to trial by jury. That this case is one in which the parties had a constitutional right to a jury trial cannot be questioned. It therefore follows that when the appellant, by her counsel, asked the court to refer the case to a referee, she, upon her own motion, obtained a trial by and the decision of a tribunal unknown to the statutes of the United States or of the Territory of New Mexico, and is bound by the action of that tribunal in so far as that action relates to the referee's ruling upon questions of evidence.

The point here sought to be made has been so often determined by this Court, upon analogous facts, that it cannot be considered as open to further discussion.

Bond vs. Dustin, 112 U. S., 604.
Paine vs. The Central Vermont R. R., 118 U. S., 152.
Roberts vs. Benjamin, 124 U. S., 64.
Andes vs. Slauson, 130 U. S., 435.
Dundee Mortgage Co. vs. Hughes, 124 U. S., 157.
Boogher vs. Insurance Co., 103 U. S., 95.

II.

The claim that appellant has not had her day in the supreme court of New Mexico, is not supported by the record.

In the closing paragraph of his brief, counsel for appellant says: "The appellant has not had her day in the appellate court. She is entitled to this. She did what she could to have the case reviewed. We ask the protection of this court." The supreme court of New Mexico was not charged with the duty of superintending the preparation of appellant's case, and its presen-

tation to the trial court. It could only act upon the record as it found it. The reports of the decisions of this court are full of cases in which the this court has declined to examine the facts of cases attempted to be brought irregularly before it, for substantially the same reasons, and under substantially the same conditions disclosed by the transcript in this case, except that it is believed that no case can be found where this court has been asked to examine evidence appearing in a transcript without any authentication whatever, as is the condition here.

The necessity for a bill of exceptions, "or something equivalent thereto," in order to make evidence a part of the record in cases, tried with or without a jury, has been insisted upon by this Court from the very earliest case in which the question arose until the present time, and it seems manifestly unfair to the territorial supreme court that the suggestion quoted should be made. There was no motion for a new trial; the documentary evidence was omitted from the transcript by direction of appellant's counsel; there was no certificate to the oral evidence, either from the referee or court stenographer; the trial judge refused to sign a propose bill of exceptions, which shows upon its face, if it may be looked to, that it contained a false recital, in that it purported to contain all the evidence whereas it contained none of the documentary evidence. The appellant made no effort to obtain a certificate from the referee, or from the court stenographer, authenticating the evidence used before the referee, but now asks this court to presume error and reverse the case, or send it back to the supreme court of New Mexico upon the claim that she has not had her day in that court.

The statutes of New Mexico require authentication of evidence before it can become part of a record in any case. In some instances it must be authenticated by the court stenographer, in others, by the referee, and in still others, by the trial judge, but in every

imaginable case, evidence, in order to become part of a record, must be authenticated by somebody. The so-called evidence in this case is not authenticated by any one.

In the absence of a motion for a new trial there could be nothing before the supreme court of New Mexico except the judgment-roll. This, as is shown by the decisions cited in the brief on motion to dismiss or affirm has been the settled rule in New Mexico from the time of the organization of the supreme court of that territory.

The contention that the exceptions to the report of the referee are to be taken as and for a motion for a new trial, is well met by the reasoning of the supreme court of Missouri :

> But it is urged that exceptions to a report of a referee take the place of a motion for a new trial; that they stand as and for such a motion. * * *
>
> The exceptions to the report of the referee are filed for the purpose of calling upon the trial court to review the rulings of the referee. This must be done before the confirmation of the judgment. It is the purpose of the motion for a new trial to give the trial court an opportunity to correct its own errors and to award a new hearing, if that be necessary to correct any errors that may have been made. We see no reason for departing from what has been heretofore said. The exceptions taken in this case and before noted, are such as can only be preserved in a bill of exceptions, and there having been no motion for a new. trial, they cannot be considered here.
>
> *State ex rel. Walker vs. Hurlstone, 92 Mo., 331-2.*

See also,

Hosford vs. Stone, 6 Neb., 378.
Perez vs. Barber (N. M.), 34 Pac. Rep., 190.
Grayson vs. Lynch, 163 U. S., 468.
Dietz vs. Lymer, 63 Fed. Rep., 758.
Kleinschmidet vs. Iler, 6 Mont., 122.

III.

What is claimed to be the oral evidence, as contained in this transcript, is not properly before the court, and cannot be considered for any purpose.

Counsel for appellant, in his brief, makes frequent reference to what was done by the referee and to the efforts of his client to obtain a review of the referee's action. On pages 15, 16 of his brief, he says:

> The record distinctly shows that plaintiff below, himself, testified that his services were rendered under a written agreement between the parties (p. 36, Record), and that said agreement had been written and signed upon page 988 of the letter-press copy-book offered in evidence (Record, p. 47), and that said page containing such alleged written agreement had been removed from said book and was lost.
>
> Upon the facts testified to by plaintiff, we submit that, while evidence of the contents of the lost paper might have been admissible in evidence, it was clearly an error decisive of this cause to permit a recovery upon testimony of plaintiff to the value of such alleged services upon a *quantum meruit* as reported by the referee and entered by the court (Rec., 122).

It is difficult to understand the purpose of this. Findings of fact by the supreme court of New Mexico are not required to enable this court to review action such as is here complained of, if it properly appears upon the record. There is, however, no assignment of error which calls in question this ruling by the referee, if it had been properly certified up from the court below, nor is there any reason apparent why this particular ruling should be called specially to the attention of this court.

If it appears affirmatively that the supreme court of New Mexico should have made findings of fact, and if

its failure to make such findings, in a proper case, is reversible error, appellant has the benefit of this contention, without asking this court to consider whether the action of the referee thus insisted upon was rightful or not. Such consideration will throw no light upon the propriety or impropriety of the action of the supreme court in failing or refusing to make findings of fact. I insist that the action of the referee (at least such action as was had prior to the filing of his report in the district court), is not before the court for any purpose, and that certainly no advantage can be obtained on behalf of appellant by reason of the fact that she has caused unauthenticated evidence to be sent up to this court and printed in the transcript. This court has said:

> It must also be borne in mind that, as already seen, in either class of cases, whether equitable or legal, coming up by appeal from a Territorial Court after a hearing or trial on the facts, the evidence at large cannot be brought up (as it is in cases in equity from the Circuit Courts of the United States), but only "a statement of facts in the nature of a special verdict," and rulings made at the trial, and duly excepted to, on the admission or rejection of evidence. *Idaho and Oregon Land Co. vs. Bradbury, 132 U. S., 514.*
>
> We are not to consider the testimony in any case. Upon a writ of error we are confined to the bill of exceptions, or questions of law otherwise presented by the record; and, upon an appeal, to the statement of facts and rulings certified by the court below. The facts set forth in the statement which must come up with the appeal are conclusive on us. *Hecht vs. Boughton, 105 U. S., 236.*

This court will indulge every presumption in favor of the regularity and validity of the judgment appealed from, and will not reverse it, unless error to the prejudice of the appellant is made to appear affirmatively. Defects in the record arising out of the negligence of counsel for appellant can certainly not be urged here in support of reversal, and it has been sufficiently

shown that whatever obstacle to a complete review of this case may exist, is the direct result of appellant's own action: First, in obtaining a reference against the consent of appellee, and afterwards in failing to make a motion for a new trial and in failing to secure the evidence to be properly preserved upon the record. There being no findings of fact and no rulings on evidence properly certified, there is, in the language of this court, nothing to review.

Young vs. Amy, 171 U. S., 179.
Naeglin vs. De Cordoba, 171 U. S., 638.
Halloway vs. Dunham, 170 U. S., 615.
Harrison vs. Perea, 168 U. S., 311.
Mining Co. vs. Machine Co., 151 U. S., 447.

IV.

The appellee asks that he be awarded damages as for a vexatious and frivolous appeal.

In this case the appeal, which was made to operate as a supersedeas, by the execution of bonds both in the supreme court of the territory and in this court, must have been taken for delay only, and upon the record the case appears to be clearly within the recent decisions of this court awarding damages under the provisions of clause 2 of rule 23 of this court.

Palmer vs. Arthur, 131 U. S., 60.
Wilson vs. Everett, 139 U. S., 616.
Mining Co. vs. Starr, 141 U, S., 222.
Texas, etc., R. R. Co. vs. Volk, 171 U. S., 73.
Nelson vs. Flint, 166 U. S., 276.

It is respectfully submitted that there is no error apparent upon the face of the record, and that the judgment of the court below should be affirmed with costs and damages.

NEILL B. FIELD,
Attorney for Appellee.

25002

Supreme Court of the United States.

No. 243.—October Term, 1900.

Barbara Chavez de Armijo, Appellant, vs. Justo R. Armijo. } Appeal from the Supreme Court of the Territory of New Mexico.

[May 13, 1901.]

Mr. Justice Peckham delivered the opinion of the Court.

This action was commenced on February 13, 1897, by the appellee Justo R. Armijo against the appellant in the district court of Bernalillo County in the Territory of New Mexico, for the purpose of recovering the sum of $9,434.44 as a balance due for services rendered during the five years prior to January 1, 1897. The defendant filed a plea of the general issue and also one of set-off. Thereafter the defendant moved to refer the case to a referee on the ground that the trial of the action would involve the taking of a long account, and the motion was granted over the objection of the plaintiff. A trial was had before the referee, who on August 18, 1898, filed his report in the clerk's office recommending judgment in favor of the plaintiff for $6,097.92 and costs. The defendant filed exceptions to the referee's report on September 2, 1898, and on the 15th day of that month the exceptions were overruled, the findings of the referee adopted as the findings of the court and judgment rendered for $6,097.92 with interest and costs.

The defendant then sued out a writ of error, and also appealed from the judgment to the Supreme Court of the Territory. For the purpose of a review in that court the defendant annexed to the judgment roll a paper purporting to contain certain evidence taken on the trial before the referee, but the same was not authenticated in any manner, either by the certificate of the stenographer who took the testimony, or by the referee, or by the judge of the court in which the trial was had. No compliance with the territorial law or with the rules of the court relating to the authentication of testimony appears by the record. There was no bill of exceptions incorporating therein the testimony and no bill was ever signed by any judge, but on the contrary the record shows that the judge declined and refused to sign, seal or settle the bill of exceptions, and it was then stated in the alleged bill that the defendant excepted to such action of the court. This is all, so far as the record shows, that the defendant did towards procuring a bill of exceptions to be signed.

It may be surmised that the court refused to sign the proposed bill of exceptions because of the recital which preceded the commencement of the testimony, in which it was stated that the evidence thereafter set out was all the evidence introduced and received on the trial of the cause, while the evidence thus certified omitted all mention of the exhibits which were offered and received in evidence by the referee, and to which attention was directed by him in his report and upon which his report was to some extent based. The proposed bill contained nothing but the oral evidence alleged to have been given on the trial of the cause before the referee. Whatever may have been the reason, the fact is that the bill of exceptions was not signed or in any manner authenticated by the judge of the court or by the referee, or even by the stenographer taking the evidence. Although exceptions to the report of the referee seem to have been filed and those exceptions overruled by the court in ordering judgment upon the report of the referee, the defendant never made any motion for a new trial.

After the writ of error was sued out and the appeal taken to the Supreme Court of the Territory counsel for the plaintiff in that court moved to strike from the transcript filed such part thereof as purported to set forth the evidence adduced on the hearing of the cause sought to be reviewed and to affirm, with damages for the delay, the judgment of the trial court and to enter judgment in this (territorial) court against the appellant for the reasons stated by him in such motion, among which was that no motion for a new trial had been made below. Thereafter the court decreed that the motion of the defendant in error and appellee to affirm the judgment on the ground that no motion for a new trial was filed in said cause, and to enter the same against the appellant and the sureties on her supersedeas bond, should be sustained and the rest of the motion overruled, and thereupon the judgment was affirmed against the appellant and the sureties on her supersedeas bond together with the costs of the Supreme Court. Judgment having been entered, the defendant appealed therefrom to this court.

After the appeal was taken application was made on the part of the appellant to the Supreme Court of the Territory to find the facts in accordance with the requirements of the act of Congress, and the court denied such application, and ordered it to be certified here that, for the reasons disclosed by the judgment, that court was unable to find the facts, the appeal not having been perfected in such manner as to bring them before that court, and this denial was certified by its Chief Justice. The Supreme Court decided that in order to bring before it the facts in a case tried before a court or referee it was necessary that a motion for a new trial should be made in the court below, and if such motion were not

made the facts in the case were not brought before the appellate court on the writ of error or appeal.

This matter of practice in the courts of the territory is based upon local statutes and procedure, and we are not disposed to review the decision of the Supreme Court in such case. (*Sweeney* v. *Lomme*, 22 Wall. 208.) Our jurisdiction to review judgments of territorial courts is found in the statute approved April 7, 1874, chapter 80, entitled "An act concerning the practice in territorial courts, and appeals therefrom." (18 Stat. 27.)

In cases not tried by a jury the record is brought before us by appeal, and on that appeal the act provides that, "instead of the evidence at large, a statement of the facts of the case in the nature of a special verdict, and also the rulings of the court on the admission or rejection of evidence when excepted to, shall be made and certified by the court below, and transmitted to the Supreme Court, together with the transcript of the proceedings and judgment or decree," &c.

This statute constitutes our only right of review on appeals from the territorial courts. (*Apache County* v. *Barth*, 177 U. S. 538, 541; *Grayson* v. *Lynch*, 163 U. S. 468, 473.)

In the absence of any findings by the Supreme Court of the Territory and also being without anything in the nature of a bill of exceptions, we have nothing on which to base a reversal of the judgment in this case. The refusal of the Supreme Court to make findings is justified by its certificate that the facts were not before it. The report of the referee authorized the judgment that was entered, and there is nothing whatever in the record to show that any error has been committed in the trial of the case. The judgment is therefore

Affirmed.

True copy.

Test:

Clerk Supreme Court, U. S.

END OF CASE